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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., INTERVENOR

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC. and COLUMBIA BROADCASTING SYSTEM, INC., INTERVENORS

Petitions for Review of Orders of the Federal Communications Commission

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Decided August 3, 1971

Mr. Thomas R. Asher, with whom *Messrs. Albert H. Kramer* and *Michael Schneiderman* were on the brief, for petitioner in No. 24,492.

Mr. Joseph A. Califano, Jr., with whom *Messrs. David H. Lloyd* and *Irvin B. Nathan* were on the brief, for petitioner in No. 24,537.

Mr. Daniel R. Ohlbaum, Deputy General Counsel, Federal Communications Commission, for respondents.

Messrs. John H. Conlin, Associate General Counsel, and *Stuart F. Feldstein*, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,492. *Mr. John H. Conlin* and *Miss Katrina Renouf*, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,537.

Mr. Henry Geller, General Counsel, Federal Communications Commission, at the time the record was filed, also entered an appearance for respondent Federal Communications Commission in No. 24,492.

Mr. Howard E. Shapiro, Attorney, Department of Justice, entered an appearance for respondent United States of America.

Mr. Ernest W. Jennes, with whom *Messrs. Charles A. Miller* and *Henry Goldberg* were on the brief, for intervenor in No. 24,492.

Mr. J. Roger Wollenberg, with whom *Messrs. Timothy B. Dyk* and *Daniel Marcus* were on the brief, for intervenor Columbia Broadcasting System, Inc. in No. 24,537.

Messrs. James A. McKenna, Jr. and *Vernon L. Wilkinson* were on the brief for intervenor American Broadcasting Companies, Inc. in No. 24,537.

Before WRIGHT, MCGOWAN and ROBINSON, *Circuit Judges.*

Opinion filed by WRIGHT, *Circuit Judge.*

Dissenting opinion filed by MCGOWAN, *Circuit Judge.*

WRIGHT, *Circuit Judge*: In these cases we are asked to decide whether a broadcast licensee may, as a general policy, refuse to sell any of its advertising time to groups or individuals wishing to speak out on controversial public issues. The Federal Communications Commission concluded that such a policy is permissible.[1] We reverse the Commission's decision. And we remand for further proceedings.

The principle at stake here is one of fundamental importance: it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. More specifically, it concerns the application of that right to the substantial portion of the broadcast day which is sold for advertising. For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines. As a result, a cloying blandness and commercialism—sometimes said to be characteristic of radio and television as a whole—have found an especially effective outlet. We are convinced that the time has come for the Commission to cease abdicating responsibility over the uses of advertising time. Indeed, we are convinced that broadcast advertising has great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.

Under attack here is an allegedly common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with "non-controversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Commission's view, an attack on the permissibility of this practice "goes to the heart of the system of broadcasting which has developed in this coun-

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[1] *Business Executives Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970); *Democratic National Committee*, 25 F.C.C.2d 216 (1970).

try." [2] We disagree. The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme* form of control which totally excludes controversial public debate from broadcast advertising time.

We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

I

Both petitioners in these cases are organizations whose primary *modus operandi* is public persuasion and communication. As a rule, they do not attract attention to their views by performing newsworthy acts, such as engaging in civil disobedience or organizing mass demonstrations. They depend, instead, on their ability to get a hearing—as full as possible and as direct as possible—from the general public. Surely radio and television would seem to be the most effective media for their purposes. Yet they contend that their self-expression on those media—and, therefore, the public's access to their views—is significantly inhibited by broadcaster policies barring any and all paid editorial messages from the airwaves.

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[2] *Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 221.

The Business Executives Move for Vietnam Peace (BEM) is a national organization of over 2,700 business owners and executives, organized in opposition to the war. BEM apparently believes that it is in a position to offer the public a unique viewpoint on what is no doubt one of the great political and moral issues of our time. In order to communicate that viewpoint, it prepared several recorded one-minute radio announcements. The announcements urged "immediate withdrawal of American forces from Vietnam and from other overseas military installations" and featured statements by leading businessmen and retired military officers whose views may carry particular weight with the general public. BEM sought to buy time to air these announcements on the broadcast media, just as commercial advertisers do. It must have seemed an extraordinarily effective means of directly communicating its ideas and sense of urgency to the broad listening audience.

In June 1969 BEM sought to purchase time for its announcements on WTOP, an all-news radio station in the nation's capital. Like most broadcasters, WTOP sells substantial amounts of time for short advertisements. Yet over a period of eight months it repeatedly refused to sell any time to the business executives. WTOP cited no particular objection to the planned announcements. Rather, it relied solely upon an across-the-board policy barring all editorial advertisements—"its long established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues." [3] BEM then filed a complaint with the Federal Communi-

[3] WTOP also stated "that 'subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement.'" *Business Executives Move for Vietnam Peace*, *supra* Note 1, 25 F.C.C.2d at 242. There is no indication, however, that WTOP's "long established policy" of refusing to sell time for *any* controversial advertisement would have permitted it to sell BEM 5 minutes or 10 minutes for a more "in-depth" treatment of its antiwar views. For a discussion of the permissibility of a flat ban on "short" public issue advertisements, *see* text at page [A-26] *infra*.

cations Commission alleging violations of both the fairness doctrine and the First Amendment.

The Democratic National Committee (DNC) came to the Commission with much the same sort of complaint. It stated that it was in the process of planning an extensive media campaign to communicate the Democratic Party's views on crucial issues and to solicit funds. In our political system, it is of obvious importance that the public have access—as direct and full as possible—to the views of the political parties. A party currently out of office may well regard such communication as particularly vital. Yet DNC alleged that it confronted several obstacles to direct self-expression on the broadcast media, among them the refusal of some broadcasters to sell time for comment on controversial public issues. Unlike the business executives, DNC did not complain of any individual refusal to sell time for a particular editorial advertisement. Rather, it cast the issue in a somewhat different light by seeking a declaratory ruling from the Commission that "[a] broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."

The Commission considered the two cases together and rejected the arguments of both BEM and DNC on the same day. The issues involved did not overlap completely. For example, the Commission found a defect in the vagueness and generality of BEM's fairness doctrine complaint,[4] and it resolved DNC's contention concerning fund

[4] In its original complaint, BEM alleged generally that WTOP had failed to cover antiwar views fully and fairly. However, it offered no specific proof whatever of its allegations, and WTOP, on the other hand, offered a lengthy compilation of news and interview shows which aired the opinions of some antiwar groups and individuals. BEM has not pressed its fairness doctrine argument on appeal, but rather has relied solely upon the First Amendment right-of-access contention which it also made before the Commission. Therefore, we need not consider here the Commission's holding that BEM failed to shoulder its full burden of going forward under the fairness doctrine.

solicitation by noting that all three television networks had agreed to accept such solicitations and by stating that any broadcaster policy of confining solicitations to election periods alone "would appear arbitrary." [5] On the matters central to these petitions for review, however, the Commission resolved both cases in the same fashion, and we, therefore, are also considering them as one.

The Commission held that it is permissible for a broadcast licensee to follow a general policy of rejecting all editorial advertisements. The essence of its reasoning in the two cases was as follows: First, it interpreted the fairness doctrine to allow rejection of paid controversial announcements. The doctrine, evolved by the Commission and endorsed generally in the Communications Act, demands that all controversial issues of public importance be covered both fully and fairly by broadcasters. Yet the Commission held that it leaves the licensees broad leeway to exercise their professional judgment as to "the format for presentation of controversial issues 'and all others facets of such programming.'" Editorial advertising, the Commission said, is simply one of several possible formats for coverage of public issues. Under the permissive "reasonableness" standard of the fairness doctrine, acceptance of that particular format is by no means compulsory.

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[5] All three television networks also commented on the sale of time for editorial advertising. CBS stated it would sell no time for such advertising, although an exception would be made for broadcasts on behalf of political candidates or ballot propositions. ABC said it would not sell time to most groups for public issue advertising since that would inspire a "flood" of requests, but it would "be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis." And NBC stated it "has no policy which would prevent the purchase of program time envisioned by DNC." We are constrained to note here that any discrimination in the sale of editorial advertising time in favor of political parties alone or the "major" political parties—and totally excluding other more issue-oriented groups or "minor" political parties—would be highly suspect under the First Amendment. *See* text at pages [A-30 - A-32] *infra*.

Second, the Commission interpreted the First Amendment to be equally permissive. Its reasoning on this point was rather sparse. It made no effort, for example, to identify the peculiar First Amendment interests attaching to paid editorial announcements as opposed to coverage of controversial issues on news, interview or discussion programs. Instead, it was content to raise the spectre of the "chaos" and other practical difficulties that, it said, would attend a right of access to the broadcast media. The Commission concluded that the fairness doctrine's requirement of full and fair coverage—tolerant as it is of a flat ban on the editorial advertisement format of expression—provides as much protection of public debate as the First Amendment demands.

Before this court, both petitioners make substantially the same attack on the Commission's decision. They do not ask for a ruling that *all* editorial advertisements submitted to broadcasters must be accepted. Nor do they seek to foreclose entirely the broadcasters' exercise of reasonable discretion. What they advocate is a *limited* right of access to radio and television for paid public issue announcements. They attack the Commission's ruling that a total exclusion of such announcements is permissible.

II

Petitioners have left no stone unturned in their attack on the exclusion of editorial advertising. They have invoked the Communications Act's "public interest" requirement [6] and the statutory-regulatory fairness requirement [7]—as well as First Amendment principles—to support their argument. In other contexts, we might attempt

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[6] 47 U.S.C. §§ 307(d), 309(a) (1964).

[7] 47 U.S.C. § 315(a) (1964). For a discussion of the regulatory development of the fairness doctrine and its eventual adoption in the Communications Act, *see Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 375-381 (1969).

to avoid the constitutional issue by coming to a decision on nonconstitutional grounds. But that course is neither fruitful nor possible here.

Speaking specifically of the Commission, the Supreme Court has stressed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). Thus the nonconstitutional question here is whether there are "compelling indications" that the public interest and fairness requirements compel some opening for public issue advertisements on radio and television. In matters of allocating burdens, reforming procedures and ensuring full attention to all relevant factors in agency decision making, we have not been reluctant to reverse the Commission in order to vindicate "the public interest." [8] We have also intervened to see that broad policies developed by the Commission under the fairness doctrine are applied fully and consistently to all cases.[9] However, when we are asked to reverse major substantive interpretations of the grand and open-ended statutory requirements, we tread somewhat more difficult terrain. Obviously, the requirements mean something and there must be a great range of actions which they foreclose to the Commission; but, in establishing the necessary guidelines, we must ourselves seek extrinsic guidance.

In these cases, that guidance comes from the Constitution. Petitioners have presented no "compelling" evidence from legislative history to indicate a congressional policy in favor of, or even a real congressional attention to, editorial advertising. Rather, their arguments on the non-

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[8] *See, e.g., Office of Communication of United Church of Christ* v. *F.C.C.*, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966); 138 U.S. App.D.C. 112, 425 F.2d 543 (1969).

[9] *See, e.g., Retail Store Employees Union, Local 880* v. *F.C.C.*, —— U.S.App.D.C. ——, 436 F.2d 248 (1970).

constitutional points closely parallel their constitutional arguments. The general policy considerations which they invoke encompass all of the interests that would have to be evaluated under the relevant First Amendment law. It would make no sense for us to blind ourselves to the constitutional status of those interests and to the doctrine that has been build up around them.

What then might be the "compelling indications" we are to consider? The ones which seem to us truly "compelling" involve First Amendment principles. Thus we conclude that the constitutional question must be faced and is, indeed, the essence of these cases. Whether our decision is styled as a "First Amendment decision" or as a decision interpreting the fairness and public interest requirements "in light of the First Amendment" matters little.

III

It has always been clear that the broadcast media—so vital to communication in our society—are affected by strong First Amendment interests.[10] Yet the nature of those interests has not been so clear; an evolution of constitutional principles in this area is still very much in progress. Until quite recently, the only interest raised to constitutional status was that of the broadcast licensees themselves. In a leading case, the Commission's powers over program content were attacked and upheld with reference solely to the licensees' right of immunity from governmental interference with their "speech." The scarcity of broadcast frequencies was said to justify some regulation trenching on the broadcasters' First Amendment interests. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). These cases mark a new effort by mem-

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[10] *See, e.g., United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). Congress itself has prohibited any interference by the Commission with "the right of free speech by means of radio communication." 47 U.S.C. § 326 (1964).

bers of the public to assert *their* First Amendment interests in the operations of radio and television.

There is scant precedent for such an effort. Indeed, the few previous attempts by individuals or groups to enforce their First Amendment interests in court have failed. In each case, the litigants have run up against not only an unreceptiveness to their constitutional theory, but also a crabbed judicial view of "state action"—a view that the "[First] Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as [broadcast licensees]." *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 1 Cir., 183 F.2d 497, 501 (1950); *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia*, 3 Cir., 151 F.2d 597, 601 (1945). *See also Post* v. *Payton*, E.D. N.Y., 323 F. Supp. 799 (1971).

We believe the path is now clear of such doctrinal impedimenta. Perhaps the most important recent development is the Supreme Court's seminal decision in *Red Lion Broadcasting Co., supra.* There the Court upheld another aspect of the Commission's regulation of program content —the fairness doctrine's personal attack and campaign editorial rules. However, the Court's opinion went well beyond the scarcity rationale of the *National Broadcasting Co.* case. It justified the Commission's interference with broadcasters' free speech by invoking specifically constitutional rights of the general public which, it said, underlie and support the fairness doctrine rules at issue. Issuing what must become a clarion call for a new public concern and activism regarding the broadcast media, the Court stated that "the people as a whole retain their * * * collective right to have the medium function consistently with the ends and purposes of the First Amendment." [11] It went on to say:

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[11] 395 U.S. at 390.

"* * * The right of free speech of a broadcaster * * * does not embrace a right to snuff out the free speech of others. * * *

* * * *

"* * * [A] licensee has no consitutional right * * * to monopolize a radio frequency to the exclusion of his fellow citizens. * * *

* * * *

"* * * It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. * * *" [12]

Of course, the *Red Lion* Court had to invoke the public's First Amendment interests for a narrow purpose only—to uphold legislative and administrative action already taken. It did not have to reach the issue, presented in these cases, of invoking those interests for a direct attack on broadcasters' policies approved by the Commission. However, the language used by the Court is significantly expansive. It spoke of a First Amendment "right" held by "the people as a whole." A constitutional "right" is hardly deserving of the name if it can function only to *permit* legislative and administrative action and if its content depends entirely upon the current policies of the legislative and executive branches. The First Amendment, after all, contains nothing analogous to the fifth section of the Fourteenth Amendment, authorizing Congress to enforce constitutional interests unenforceable by the courts.[13]

For many purposes, it is proper to consider broadcast licensees as "private" businesses. Yet, for purposes of

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[12] *Id.* at 387, 389, 390.

[13] On the effect of the specific language in the fifth section of the Fourteenth Amendment, *see Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Of course, the Fourteenth Amendment does not apply to federal regulation of the broadcast industry, since no interference with the states is involved.

the First Amendment, "[o]wnership does not always mean absolute dominion." *Marsh* v. *Alabama*, 326 U.S. 501, 506 (1946). "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966). The *Red Lion* Court itself commented on the impermissibility of "private censorship" and cited old doctrine that "'[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'" [14] The reach of the First Amendment, therefore, depends not upon "public"—"private" technicalities, but upon more functional considerations. They are (1) the governmental involvement in or public character of a particular enterprise, and (2) the importance or suitability of that enterprise for the communication of ideas.[15]

The last few decades of court decisions expanding the concept of "state action" have focused on myriad indicia of governmental involvement and public character. Many

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[14] 395 U.S. at 392, quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

[15] Most "state action" cases, of course, have been concerned with equal protection rights under the Fourteenth Amendment rather than with free speech rights under the First Amendment. However, the principle of governmental involvement developed therein has been applied equally well in the First Amendment context. *See, e.g., Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952); *Farmer* v. *Moses*, S.D. N.Y., 232 F.Supp. 154 (1964). The principle of "public character" may be found in decisions dealing directly with application of First Amendment rights to "private" entities. *See., e.g., Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Tanner* v. *Lloyd Corp., D. Ore.*, 308 F.Supp. 128 (1970); *Diamond* v. *Bland*, 91 Cal. Rptr 501, 477 P.2d 733 (1970). The importance and suitability of a particular place for the communication of ideas has been stressed in all of the cases cited above, as well as in all of the access-to-public forum cases, *see* Notes 40-43 *infra*.

of them are apparently applicable to the operations of the broadcast industry.[16] But we need stress only two more basic factors which, taken together, bring broadcast licensees well within the ambit of the First Amendment for the purposes of these cases. First, the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the federal government—a relationship which puts that industry in a class with few others.[17] It is one of "interdependence" and "joint participa[tion]." *See Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). "[T]he [federal] regulatory system," it has been said, "is as much responsible for the existence of a broadcasting medium as the Bureau of Engraving is responsible for the existence of United States currency."[18] It has

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[16] Dissenting in the BEM case now under review, Commissioner Johnson dealt exhaustively with the Supreme Court's state action doctrine, isolating eight separate indicia of "state action." He argued very strongly that all eight indicia apply to broadcast licensees. *Business Executives Move for Vietnam Peace*, *supra* Note 1, 25 F.C.C.2d at 258-264. Because this highly analytical—one might say mechanical—approach runs the risk of reading Supreme Court opinions for more than they mean, we have chosen to paint with a broader brush. Ours is the approach which the Supreme Court seems in fact to have used in the past.

[17] In particular, broadcasting may be easily distinguished from the newspaper industry in terms of "state action." In two recent decisions, courts have held that newspapers are not subject to the First Amendment. *Associates & Aldrich Co., Inc.* v. *Times Mirror Co.*, 9 Cir., 440 F.2d 133 (1971); *Chicago Joint Board* v. *Chicago Tribune Co.*, 7 Cir., —— F.2d ——, 39 U.S. L. WEEK 2360 (December 17, 1970). While the governmental involvement in and public character of newspapers in surely less than that of broadcasting, we of course need express neither agreement nor disagreement with the cited decisions here.

[18] Pemberton, *The Right of Access to Mass Media*, in N. DORSEN (ed.), THE RIGHTS OF AMERICANS 277, 290 (1971). The Government is also directly responsible for the very existence of particular broadcasters. "[E]xisting broadcasters have often attained their present position because of their initial government selection in competiton with others * * *. * * * [Their present] advantages are the fruit of a preferred position conferred by the Government." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 400.

long been recognized that the airwaves are "a limited and valuable part of the public domain," [19] leased out temporarily by the federal government which retains ultimate control over them.[20] Federal agency review and guidance of broadcasters' conduct is automatic, continuing and pervasive.[21] For broadcast licensees are considered the "proxies" or "fiduciaries" of the people.[22] Almost no other private business—almost no other regulated private business—is so intimately bound to government and to service to the commonweal.

A second and even more important factor is the *specific* governmental involvement in the broadcasters' action now under review here. All of the cases in which previous courts have characterized broadcasters as mere "private corporations" immune from First Amendment constraints, *see* text at page [A-11] *supra*, have involved direct suits against broadcast licensees. In the cases before us now,

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[19] *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S.App.D.C. at 337, 359 F.2d at 1003.

[20] The licensing-out or delegation of governmental authority has been an element in some of the Supreme Court's most expansive state action decisions. *See Evans* v. *Newton*, 382 U.S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Smith* v. *Allwright*, 321 U.S. 649 (1944). The mere existence of a licensing or delegation relationship is not, of course, enough by itself to establish state action; licensed pharmacists cannot be equated with licensed broadcasters. The actual extent of governmental involvement and the public character of the enterprise in question remain the final tests of state action.

[21] The activities of a governmental regulatory agency have also been emphasized in at least one of the Supreme Court's expansive state action decisions. *See Public Utilities Comm'n* v. *Pollak*, *supra* Note 15, 343 U.S. at 462, *citing American Communications Ass'n* v. *Douds*, 339 U.S. 382, 401 (1950) ("[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.").

[22] *See Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 394, 396; *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S.App.D.C. at 337, 359 F.2d at 1003.

however, the Commission has given its imprimatur to the flat ban on editorial advertising. It specifically considered and specifically authorized the flat ban. Thus we are called upon to review not simply a private decision, but a decision by a government agency, a decision which must inevitably provide guidance for future broadcaster action.

There is ample authority for the principle that specific governmental approval of or acquiescence in challenged action by a private organization indicates "state action." [23] Indeed, in a case similar to ours the Supreme Court held that a private bus company franchised by the federal government and regulated by the District of Columbia Public Utilities Commission could be subject to First Amendment constraints. It emphasized the specific regulatory acquiescence in the challenged action of the bus company:

> "* * * In finding [state action] we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Com-

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[23] The Supreme Court has said that "action of state courts and judicial officers in their official capacities is to be regarded as action of the State * * *." *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948). *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L. J. 219, 227-230. *See also* this court's discussion of the *Shelley* principle—which surely must apply to actions of a federal administrative agency specifically approving private action—in *Edwards* v. *Habib*, 130 U.S.App.D.C. 126, 397 F.2d 687 (1968). Specific governmental acquiescence, as well as specific approval, has also been a focus of Supreme Court state action decisions. *See Marsh* v. *Alabama*, *supra* Note 15, 326 U.S. at 507 & n.4, 509; *Burton* v. *Wilmington Parking Authority*, *supra* Note 20, 365 U.S. at 725.

> mission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the [challenged action], ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. * * *"

Public Utilities Commission v. *Pollak*, 343 U.S. 451, 462 (1952). (Footnote omitted.)

Broadcasting's importance and suitability for communication of ideas need not be labored. Mere presence of large and appropriate audiences (and thus opportunities for effective communication) has sometimes been emphasized by the courts to show the relevance of First Amendment protections.[24] In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), for example, the Supreme Court held that a privately owned shopping center was an appropriate place for the "speech" of labor union picketers. It stressed "[t]he large-scale movement of the country's population from the cities to the suburbs [that] has been accompanied by the advent of the suburban shopping center * * *." *Id.* at 324. With this demographic change, the "speech" that once took place on the public streets around downtown shopping areas must be allowed to move to privately owned parking areas in the suburbs, for that is where the relevant audiences now are. The technological and cultural changes connected to the current preeminence of the broadcast media as our primary means of communication are no less striking. The soap box orator and the

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[24] *See, e.g., Wolin* v. *Port of New York Authority*, 2 Cir., 392 F.2d 83, 90-91 (1968) ("The propriety of a place for use as a public forum * * * [may be established if] the place is where the relevant audience may be found."). Of course, the cases before us involve the right to speak on a *medium* of communication, not in a particular *place*. Thus many of the considerations are different; but the basic concern with the ability to reach the relevant audience applies in both situations.

leafleter are becoming almost obsolescent; their Saturday afternoon audiences have increasingly moved indoors—in front of their television sets.[25]

Moreover, unlike most of the private entities held to be subject to First Amendment constraints, the broadcast media are specifically dedicated to communication. They function as both our foremost forum for public speech and our most important educator of an informed people. In a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the processes of self-government and free expression, so central to the First Amendment. That can be said of almost no other "private" enterprise.

IV

Broadcast licensees, then, serve not only as "speakers" but also as administrators of a highly valuable communications resource, subject to First Amendment constraints. Their dual role demands that their own constitutional interests in free speech coexist with those of the general public. But what are the dimensions of the public's First Amendment interests in the operation of radio and television? And how do they apply to the issue of editorial advertising?

It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with time relinquished by broadcasters to others; petitioners argue only that, in relinquishing that time, broadcasters must not discriminate against protected expression. In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news and

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[25] The Supreme Court has noted that broadcast "technology * * * supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news * * *." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 386 n.15.

documentary presentations, for example, the broadcasters' own interests in free speech are very, very strong.[26] The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interests. *Their* speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak.

Though the broadcasters themselves have no substantial First Amendment interest in the allocation of advertising time, we might expect that the interest of members of the public—potential advertisers—would be quite strong. However, the Commission and the broadcaster-intervenors have argued just the opposite. They contend that the public's constitutional concerns do not extend to advertising time. Thus we must decide whether the substantial block of the broadcast day devoted to advertising is but a vacuum, devoid of First Amendment constraints, in the midst of a medium powerfully affected by those constraints—a desert in the midst of an oasis.

The Commission and intervenors work from the following premise. They define the public's overall constitutional interests in the operations of radio and television quite narrowly. The public's only interest, they suggest, is as viewers and listeners—not as speakers. They cite to us the *Red Lion* Court's mention of "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences" over the broadcast media.[27] And they read that statement to set forth not only *an* interest of the public, but the *only* interest of the public.

Working from that premise, the Commission and intervenors contend that the public already receives "suitable

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[26] *See id.* at 396.

[27] *Id.* at 390.

access" to controversial views on normal programming time. Application of the fairness doctrine's requirement of full and fair coverage of public issues in non-advertising time, they suggest, ensures that all views on these issues will in fact be presented. They assume that editorial advertising adds nothing new to the debate. The fairness guarantee alone, they say, is enough to eliminate petitioners' claim on advertising time—and enough to satisfy the First Amendment. We disagree.

Surely the public's interest in free access to the full spectrum of ideas and controversial views on radio and television is highly important. The right to receive ideas and information is deeply rooted in First Amendment law.[28] The *Red Lion* Court stressed that right, since it was the one primarily relevant to the fairness doctrine rules at issue in the case. But we do not believe that the *Red Lion* decision makes the goal of an informed public the exclusive First Amendment interest constraining broadcasters. Certainly the Supreme Court has done so in no other context.

The public has a First Amendment interest in the mode or manner—as well as the content—of public debate aired on the broadcast media. The *Red Lion* Court itself stated specifically that "[i]t is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas [in the broadcast media]."[29] This court, similarly, has said that the Commission is obliged to administer the airwaves "in such a manner that * * * debate on public issues is 'uninhibited, robust and wide-open.'" *National Ass'n of Theatre Owners* v. *F.C.C.*, 136 U.S.App.D.C.

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[28] *See Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Lamont* v. *Postmaster General*, 381 U.S. 301, 307-308 (1965) (Mr. Justice Brennan, concurring); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943). The "right to receive," however, has not been considered the central First Amendment interest, and never the only First Amendment interest.

[29] 395 U.S. at 390. (Emphasis added.)

352, 365, 420 F.2d 194, 207 (1969). The reference to "uninhibited" debate is, of course, borrowed from the Supreme Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The Court there extended First Amendment protection to some forms of libel on public officials. It made clear that the Amendment's concern extends beyond the mere fostering of speech whose content will properly inform the public. The *New York Times* decision establishes a strong First Amendment interest in vigorous, "wide-open" public debate.

Furthermore, we must take note of a third—but, perhaps, most important—First Amendment interest. That is the interest of individuals and groups in effective self-expression. The *Red Lion* Court did say that "it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [30] For, as it pointed out, broadcast time is necessarily limited. But the limited nature of broadcast time does not dictate that the individual and group interest in self-expression be brushed aside entirely; it allows for a reasonably regulated, "abridgeable" right to speak. The First Amendment values of individual self-fulfillment through expression and individual participation in public debate have long been recognized.[31] We all have an interest in speaking up ourselves as well as in hearing others. It is too late to argue that the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way.

We conclude, then, that the public's First Amendment interests constrain broadcasters not only to provide the full spectrum of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide opportu-

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[30] *Id.* at 388.

[31] *See, e.g.*, T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (Vintage ed. 1967).

nity for individual self-expression.[32] How do these three First Amendment interests relate to a more specific interest in the airing of editorial advertisements? The answer emerges when we understand the special importance of advertising time to our system of free expression. First, the initial decision to produce an editorial advertisement is in the hands of members of the public. The initiative to present a particular view does not have to come from a member of the broadcaster's staff. Second, a paid advertisement is basically controlled and edited by the advertiser. He is allowed to present his views in a fashion chosen by himself. If an individual is interviewed for a news program, he may expect his comments to be abbreviated and edited; reporters' commentary will qualify what he has to say. For it is the broadcasters' responsibility to be objective, to condense issues into available time for presentation, and to play up or play down views according to the *broadcaster's* opinion of what is important and interesting. But when an individual or group buys time to say its piece, the crucial controls are in its own hands. Editorial advertising is thus a special and separate mode of expression, not simply a duplication of other expression on the same medium.[33]

The importance of initiative and control to the First Amendment interests in wide-open debate and individual self-expression should be obvious. Vigorous, free expression is promoted when members of the public have *some*

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[32] Of course, all three of these interests apply to non-advertising time as well as to advertising time. The Commission, in fact, has encouraged broadcasters to present conflicting views through partisan voices as well as through predigested commentary. *See Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 222-223. However, as we make clear in text, the selective, edited presentation by the Government's licensee of partisan voices on news shows, for example, does not erase the *special* advantages of allowing self-selected partisan voices on advertising time.

[33] *See* text at pages [A-25 - A-26] & Note 37 *infra*. *See also* Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532, 557-560 (1971).

opportunity to take the initiative and editorial control into their own hands on the broadcast media. It has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others. In the First Amendment area, our best guarantee has always been a "free market" in which partisans who feel strongly on particular issues may decide on their own to speak out and to speak out in their own way. The present system, allowing a flat ban on editorial advertising, conforms instead to a paternalistic structure in which licensees and bureaucrats decide what issues are "important," how "fully" to cover them, and the format, time and style of the coverage.

Even if broadcasters were to succeed in presenting a full spectrum of viewpoints and partisan spokesmen on non-advertising time, their retention of *total* initiative and editoral control is inimical to the First Amendment. The importance of fair, objective and full treatment of controversial issues on normal programming cannot be doubted. But, as the Supreme Court has said in the context of classroom debate, "supervised and ordained discussion" is not enough. *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969). "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). In other words, there is always a strong First Amendment interest in opening up channels for more spontaneous, self-initiated, self-controlled expression.[34]

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[34] We are cognizant of current proposals to reform the Commission's fairness doctrine and invigorate its enforcement, so lackluster in the past. We commend the Commission's consideration of new rules to "encourage and implement" presentation of opposing viewpoints by reemphasizing the obligation to "seek out"

Even in terms of the public's First Amendment interest emphasized by the Commission and intervenors—the interest of "viewers and listeners" in passive access to the full spectrum of viewpoints on radio and television—editorial advertising plays an important role. The concept of "full" coverage of "controversial" issues "of public importance" is vague to say the least, and leaves much

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controversial issues. *Obligations of Broadcast Licensee Under the Fairness Doctrine*, 35 FED. REG. 7820 (1970). But, as the Commission says, the proposed rules would be but a "modest * * * step in promoting access to the media." *Id.* at 7821. They go little beyond the present obligation to give "full" coverage to controversial issues. Such an obligation is inherently difficult to define and enforce. At best, the Commission can evaluate only the *general* willingness of a licensee to "seek out" issues and glaring examples of noncoverage of obviously important issues. The Commission cannot be expected to engage licensees in fine debates over coverage of less obviously life-or-death issues. But the fundamental point—the point we emphasize—is that no matter how "fully" controversial issues might be covered in a perfect broadcasting world, the basic initiative and control remains with the licensee. Because there is not even a partial "free market" opening to the public at large, the crucial First Amendment interests in decentralized initiative and control go unsatisfied.

We realize that there is another possible, but purely speculative, reformation of the fairness doctrine now under consideration which might be supposed to obviate the need for a measure of "free market" access to advertising time. It has been proposed that licensees be required to provide self-edited advertising time to groups or individuals under the fairness doctrine only when a commercial advertiser has already taken a controversial position in his broadcast messages. Such an approach has been taken regarding cigarette advertisements, though that case was said to be extraordinary and not to establish a general precedent. *Banzhaf* v. *F.C.C.*, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968). But even if that principle were made to apply generally, it would leave the initiative solely in the hands of commercial advertisers: the only issues on which noncommercial groups and individuals could speak through editorial advertisements would be those issues which commercial advertisers had already chosen to raise themselves. Allowing such a narrow group, motivated largely by business profit, to set the agenda for editorial advertising is unconscionable and contrary to First Amendment precepts. It is crucial that noncommercial groups and individuals have the same rights of initiative as commercial advertisers.

to the broadcasters' discretion (and possible oversight).[35] Assuming that broadcasters are sometimes fallible, the goal of a fully informed public is best attained by opening of outlets for members of the public to supplement the licensees' assessments of "importance," "controversiality" and "full" coverage. The Commission's and intervenors' argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time.[36] The argument is unconvincing, however, in support of a flat, *per se* ban on any and all editorial advertisements.

Moreover, even if "antiwar views," for example, have in fact been presented on news and interview shows, it is not *necessarily* clear that a particular antiwar editorial advertisement would add nothing to the public's information and understanding. "Viewpoints" cannot be so neatly and infallibly catalogued as the Commission would have us believe. Self-expression and public debate are much more subtle phenomena; matters of style and intensity of feeling are important components.[37] Again,

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[35] The guarantees of full and fair coverage have proved particularly difficult to define and enforce in the past. They have taken on effective meaning only in the most extreme cases of broadcaster irresponsibility. For a depressing critique of the Commission's apparent inability to enforce its own standards, *see* Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968).

[36] Even then, however, the special attributes of editorial advertising would not be eliminated by the broadcaster's own coverage. *See* text at pages [A-21 - A-23] *supra* & pages [A-25 - A-26] *infra*.

[37] In *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F.Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F.2d 1257 (1971), the court held that a school newspaper was obliged under the First Amendment to print antiwar editorial advertising, even though antiwar views could be printed in the newspaper's news and letters-to-the-editor columns. The court stressed the qualitative—and valuable—difference in expression of views through an editorial advertisement. "It is readily apparent," it said, "that a paid advertisement can be cast in such a form as to command much greater attention than a letter to the editor. Large type, photographs,

an across-the-board ban on editorial advertisements—leaving the quality of public debate in the control of one licensee, supplemented by no other autonomous inputs—may well ignore opportunities to enliven and enrich the public's overall information.

We recognize, of course, that the onesidedeness and private editing of particular "spot" editorial advertisements may in the end steer viewers and listeners away from the "truth" by distorting complex issues. Being brief, these "spot" messages—no less than normal broadcast news coverage—may not canvass all possible arguments or develop all possible implications of the position they espouse. But that does not mean that they are unprotected by the First Amendment. Our Constitution protects many forms of misleading and overly simplified political expression in order to ensure robust, wide-open debate. "[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct * * *." *New York Times Co.* v. *Sullivan, supra*, 376 U.S. at 273. Nor does the brevity of the criticism. We must, then, be very, very slow to judge any sort of speech on public issues worthless. The marketplace of ideas protected by the First Amendment, after all, is not governed by the tastes and intellectual standards of the universities or the broadcast newsroom —or even of judicial chambers.

We conclude, therefore, that the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time. We must concur in the Supreme Court's only recorded comments on constitutional

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repeated publication and full pages of space are some of the modes of expression available in an editorial advertisement that might not be available in a letter to the editor." *Id.* at 1101. Another court has come to the same result in a newspaper editorial advertising case. *Zucker* v. *Panitz*, S.D. N.Y., 299 F.Supp 102 (1969). *See* text at pages [A-27 - A-29] *infra*.

protection for editorial advertising—comments made in the context of newspapers, like broadcasting a medium which may be expected, if not required, to present the various sides of public issues in its non-advertising space. The Court said that editorial advertisements, unlike commercial advertisements,[38] are of fundamental First Amendment concern, since they deal with political questions. And it protected them from libel law attack to the same extent as the newspapers' own editorial columns, for

> "[a]ny other conclusion * * * might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. * * * The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' * * *"

New York Times Co. v. *Sullivan, supra,* 376 U.S. at 266.

V

We come now to the aspect of the broadcasters' policy which, petitioners say, trenches on the First Amendment interest in editorial advertising. The constitutional defect of that policy is somewhat ironic. The *New York Times* Court made clear that the fact distinguishing fully protected editorial advertising from less fully protected commercial advertising is that the former deals with controversial public issues. Indeed, the political nature of editorial advertising places it near the core of the First Amendment. However, the very characteristic which affords it strict constitutional protection is also the characteristic causing the broadcasters' challenged

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[38] Commercial advertising—indeed, any sort of commercial speech—is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment. *See Breard* v. *City of Alexandria,* 341 U.S. 622 (1951); *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942).

policy to single it out and exclude it from the airwaves. That, we believe, is the crucial aspect of these cases.

It is important to note that petitioners do not attack the exclusion of editorial advertising by broadcasters who accept no advertisements whatever.[39] We do not have to decide whether the broadcast medium inherently amounts to a "public forum" on the order of public streets or parks or meeting halls or even bus terminals.[40] We leave open the possibility that broadcasters may constitutionally relinquish no time at all for advertising of any sort. For the issue in these cases is the permissibility of discrimination, within a given block of advertising time, against "controversial" speech and in favor of commercial and "noncontroversial" speech. We deal here with a forum that already has been opened up by the licensees themselves, opened up for direct broadcast presentations by members of the public.

Fortunately, we do not write on a clean slate in this area. Six courts have confronted discriminations among types of speech like the one challenged here. Every one of them—four federal courts and two state supreme courts—has held that once a forum, subject to First Amendment constraints, has been opened up for commercial and "noncontroversial" advertising, a ban on "controversial" editorial advertising is unconstitutional unless

[39] DNC's position is somewhat ambiguous. The ruling which it requested from the Commission would, by its terms, apply to all broadcasters, whether or not they accept any advertising. *See* text at page [A-6] *supra*. However, on appeal DNC's arguments have been focused entirely on broadcasters who do already accept noncontroversial advertising. The interests of particular licensees in keeping all advertising off the air were not explored before the Commission or before this court—for example, an all music station may have a very substantial interest in broadcasting no paid announcements. Because the special issues relating to such licensees were not presented here, we do not decide them.

[40] *See, e.g., Schneider* v. *State*, 308 U.S. 147 (1939); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Wolin* v. *Port of New York Authority*, *supra* Note 24. *See generally* Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 SUP. CT. REV. 1.

clearly justified by a "clear and present danger." *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F. Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F.2d 1257 (1971); *Zucker* v. *Panitz*, S.D. N.Y., 299 F.Supp. 102 (1969); *Kissinger* v. *New York City Transit Authority*, S.D. N.Y., 274 F.Supp. 438 (1967); *Hillside Community Church, Inc.* v. *City of Tacoma, Wash.*, 455 P.2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal.Rptr 430, 434 P.2d 982 (1967). We join this unbroken line of authority.

First Amendment doctrine governing access to forums for communication has been elaborated often in recent years. The essential test is an exercise in balancing, though weighted in favor of First Amendment values.[41] On one hand, the court must assess the constitutionally protected interest in the particular expressive activity in the particular forum. On the other hand, it must assess the importance of other uses of the forum which may be threatened and the extent to which they actually will be disrupted. Access may be denied only if the disruption caused by a particular type of expression (*e.g.*, public speaking, marching, picketing) clearly overrides the "preferred" interest in free speech. Thus there is some right of access by demonstrators to state capitol grounds [42] but not to a jailyard.[43]

Ordinarily, courts have to make the basic balancing judgment on their own. However, when the administra-

[41] Most of the cases, other than those cited above in text, have involved access to particular places in order to perform expressive activities such as speaking, leafleting, or demonstrating in some fashion. For general discussions of the cases and the principles applied, *see* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (paper ed. 1965); Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773 (1967). There is no reason why the general principles applied in cases involving access to *places* should not apply to our cases involving access to a particular *medium* of expression. *See* Note 24 *supra*.

[42] *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

[43] *Adderley* v. *Florida*, 385 U.S. 39 (1966).

tor of a forum has determined to grant access to some speakers or some picketers, he has implicitly made that basic judgment himself. When some public speaking is allowed in a park, the park's administrator has determined that the normal and proper functions of the park will not be excessively harmed by public speaking. If he then attempts to deny access to other public speakers he cannot be heard to claim the opposite. The burden is on him to show some very substantial factor distinguishing the disruption that would cause from that caused by the speaking or picketing already allowed.

The same principle applies to broadcasters who have opened their forum to commercial speech but would close it to controversial political speech. By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising—which we have shown to have great First Amendment value—is then highly suspect, a *prima facie* constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.

The content of the idea which the excluded speakers seek to promote is—emphatically—*not* permitted as a distinguishing factor in itself. Indeed, the existence of an exclusionary discrimination apparently based on the content of ideas presents an additional, or greatly heightened, *prima facie* constitutional violation. Both free speech and equal protection principles condemn any discrimination among speakers which is based on what they intend to say.[44] If the First Amendment prohibits any-

[44] For discussions of the First Amendment-equal protection intersection, *see* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1492-1497 (1970); Kalven, *supra* Note 40, 1965 SUP. CT. REV. at 29-30; Van Alstyne, *Political Speakers at Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328, 337-339 (1963).

thing at all, it must be a censorial discrimination among ideas. And since First Amendment rights have been held to be "fundamental rights" triggering the strict standard of review under equal protection principles, *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968), it is doubly clear that the burden of justifying any apparent discrimination is very great indeed.

At least 20 years ago, the Supreme Court began condemning discriminations among different exercises of the same type of expression. *Fowler* v. *Rhode Island*, 354 U.S. 67 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268, 272-273 (1951). Both cases involved access to a forum already opened to others. More recently, the Court in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), invalidated a state regulation that permitted labor picketing but not civil rights picketing. In his concurrence, Mr. Justice Black stated that this sort of discrimination is "censorship in a most odious form" and violates both the First Amendment and the equal protection clause. *Id.* at 581. Similarly, in *Adderley* v. *Florida*, 385 U.S. 39 (1966), the Court upheld a ban on demonstrations in a jailyard, but was careful to note that "[t]here is not a shred of evidence in this record * * * [the demonstrators were excluded] because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." *Id.* at 47.

No doubt a discrimination against all controversial speech—such as we face in these cases—is somewhat less "odious" than a discrimination among different controversial viewpoints on particular issues. But it is a form of censorship just the same.[45] It is a favoritism toward

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[45] In *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr 430, 434 P.2d 982, 986 (1967), the California Supreme Court came to the same conclusion as we do on this issue, saying:

> "* * * The vice is not that the district has preferred one point of view over another, but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the

the *status quo* and public apathy and, in these cases, a favoritism toward bland commercialism.[46] Such favoritism flies in the face of the First Amendment, whose central purpose is to protect and promote controversy, "uninhibited, robust and wide-open," on public issues.

Moreover, it is by no means clear that a broadcasters' ban on "controversial" advertising does not impermissibly open the door to a *sub rosa* discrimination *among* controversial ideas. The term "controversial" is extraordinarily vague. Some advertisements may not be deemed "controversial"—and may not even be "controversial" for purposes of the fairness doctrine [47]—but may still express ideas, the negative of which would surely be labeled "controversial." [48] Ads for Radio Free Europe or Army re-

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expression of only those selected, and banning others. Thus the district's regulation exercises a most pervasive form of censorship.

"* * * [T]he district's policy * * * affords total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism. No statistical data is required to demonstrate that in the totality of man's communicable knowledge, that which bears no relationship to material value preponderates."

The Supreme Court of Washington specifically adopted this view in *Hillside Community Church, Inc.* v. *City of Tacoma*, Wash., 455 P.2d 350, 353 (1969).

[46] Commissioner Johnson commented in his dissent that broadcasters "have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. * * * We have an individual right of access, all right, but only for hucksters of industrial garbage." *Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 233.

[47] *See Banzhaf* v. *F.C.C.*, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968); *Green* v. *F.C.C.*, —— U.S.App.D.C. ——, —— F2d —— (Nos. 24470 & 24516, decided June 18, 1971).

[48] In *Wirta* v. *Alameda-Contra Costa Transit District, supra* Note 45, 434 P.2d at 987, the California Supreme Court made the same point very forcefully, and provided several telling examples:

[Footnote continued on Page A 33]

cruiting, for example, may be allowed unanswered on the air, while ads calling the notion of the "free world" a sham or ads calling the Army a threat to democracy would be banned entirely. The line between ideological and nonideological presentations is an almost impossible one to draw. All too often in our society one particular ideology—that of passivity, acceptance of things as they are, and exhaltation of commercial values—is simply taken for granted, assumed to be a nonideology, and allowed to choke out all the rest.[49]

Thus the editorial advertising ban, particularly when licensees accept advertising generally, establishes an unmistakable infringing of First Amendment liberties. The Commission and the broadcasters, then, bear a very heavy burden of justification. Whether we require a "compelling" justification, an "overriding" justification, or a "clear and present danger" is relatively unimportant.

VI

It being established that there is a strong and specific First Amendment interest in editorial advertising and that the policies discriminatorily barring such expression work a *prima facie* violation of constitutional principles, we must consider the countervailing considerations raised by the Commission and the broadcaster-intervenors. In order to justify the policy at issue, they must show some very substantial harm that would be caused by acceptance

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[48] [Continued]

"* * * A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program."

[49] *See generally* C. WAXMAN (ed.), THE END OF IDEOLOGY DEBATE (1969).

of editorial advertising—a sort of harm great enough to override the First Amendment interests at stake and a sort of harm not already involved in the acceptance of commercial and "noncontroversial" advertising. Only such a showing could convince us that the ban on editorial advertisements is supported by sufficient countervailing values and is not based solely on the content of the ideas conveyed.

The Commission and intervenors have begun from the assumption that our holding for petitioners would deprive broadcast licensees of their highly prized editorial independence and control over their frequencies, giving editorial advertisers a *right* to air time which commercial advertisers do not presently have. They have argued that petitioners seek the right to "grab the mike" from broadcasters' hands.[50] The result, they say, would be a threefold disaster. First, they foresee " 'a return to the chaotic situation of radio's early days' " [51] when too many hands grabbing for too few mikes made successful broadcasting impossible. Second, they argue that compulsory acceptance of editorial advertising would allow a few rich individuals or groups to buy up great blocks of time to purvey views on only one side of important issues, thus grossly unbalancing the broadcast station's treatment of those issues. And third, they point out that broadcasters compelled to accept editorial advertisements on one side of an issue would then be required by the fairness doctrine to accept at least some advertisements on the other side —free of charge if necessary. Provision of such free advertising time, they say, would cut into the broadcasters' revenues and might bring financial collapse.

The arguments of the Commission and intervenors fall well short of the mark. The reason is that they have

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[50] Statement of attorney for intervenor Columbia Broadcasting System at oral argument before this court.

[51] Brief for the Commission in Case No. 24,537 at p. 12.

apparently misunderstood the narrowness of the issue here. All that we are considering is the permissibility of a total, flat ban on editorial advertising. All petitioners ask is that broadcasters be required to accept *some* editorial advertising. They do not advocate an absolute right to air their advertisements. As the *Red Lion Court* made clear, there could not be any such absolute right because advertising time, like all broadcast time, is severely limited. *See* text at page [A-21] *supra.* Under the Communications Act, broadcasters are not "common carriers" obliged to accept any advertising message that is submitted.[52] And petitioners do not argue that they should be. What petitioners do argue is that editorial advertisements should at least be considered and that some should be aired.

Such a modest reform would not substantially undermine broadcasters' editorial control over their frequencies. For broadcasters would retain full latitude to control the content of their programming. Their editorial control over non-advertising time would not be disturbed whatever. All that would be affected is their allocation of advertising time—an area in which *editorial* control over content has never been of major importance. The interest in deciding which advertisements to accept is not as great as in deciding what public issues to cover and how to cover them on news presentations, for example. *See* text at page[s] [A-18 - A-19], *supra.* It surely cannot be

[52] 47 U.S.C. § 153(h) (1964). The Commission and intervenors argue that this "common carrier" provision would be declared unconstitutional if we were to decide for petitioners in these cases. That, of course, is absolutely incorrect. The Commission and intervenors also point to a part of the Communications Act providing that if a station permits one candidate for office to use its facilities, it must then permit others equal time, but providing also that "[n]o obligation is imposed upon any licensee to allow the use of its station by any such candidate." 47 U.S.C. § 315(a) (1964). This statutory provision squares perfectly with our holding that a broadcaster is not necessarily obliged to provide any time for advertisements, but that if he does sell some advertising time he may not totally exclude editorial advertising.

equated, as the Commission and intervenors suggest, with the interest of law review editors in deciding what articles to publish. *See Avins* v. *Rutgers, State University of New Jersey*, 3 Cir., 385 F.2d 151 (1967), *cert. denied*, 390 U.S. 920 (1968). A broadcaster traditionally is not nearly as involved in the preparation and editing of advertisements as a law review staff is in the preparation and editing of articles.

Within the affected block of advertising time, neither chaos nor anything approaching chaos would follow the modest reform at issue. For, again, broadcasters would retain wide-ranging control. It is well established in First Amendment law governing access to forums that "reasonable regulations" may be promulgated and enforced to limit the exercise of free speech.[53] At the least, there may be regulations determining the time, place and manner of speech. They may not be used to stifle speech, but they are absolutely necessary to see that too many groups speaking at once do not drown out one another or trench overly much on the normal uses to which the forum is put by the public in general. The same principle applies to broadcasters' methods for allocating advertising time. All that petitioners condemn here are regulations providing that public issue advertising may be aired "at no time, in no place and in no manner" over the broadcast media.

Clearly, for example, broadcasters are entitled to place an outside limit on the total amount of editorial advertising they will sell. To fail to impose some such limit would be to deny the public the other sorts of programming which it legitimately expects on radio and television. Similarly, "reasonable regulation" of the placement of advertisements is altogether proper. No advertiser has a right to air his presentation at any particular point

[53] *See, e.g., Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968); Note, *supra* Note 15.

in an evening's programming. Nor does he have a right to clog a particular time segment with his messages. A relegation of all editorial advertising to non-"prime time" or any other major discrimination in the placement of editorial advertisements would no doubt go too far. But there is still room for broad exercise of the broadcasters' discretion.

We need not define the precise control which broadcasters may exercise over editorial advertising. Rather, the point is that by requiring that *some* such advertising be accepted, we leave the Commission and licensees broad latitude to develop "reasonable regulations" which will avoid any possibility of chaos and confusion. The spectre of chaos and "mike grabbing" raised by the Commission and intervenors here is, as petitioners say, a "bogus issue." Broadcasters, after all, have dealt quite successfully with the scheduling problems involved with commercial advertising. We require only that noncommercial advertisers be treated in the same evenhanded way. Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted.

Beyond the mistaken suggestion of administrative apocalypse, the Commission and intervenors have raised a more plausible and important claim, involving the danger that a few individuals or groups might come to dominate editorial advertising time. Of course, the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely. It takes more money to operate a magazine or newspaper—or, for that matter, a broadcast station—than to buy a segment of time for an editorial advertisement. Yet we are not reluctant to provide strict First Amendment protection for the operators of magazines, newspapers and broadcast stations. The real problem, then, is not that editorial ad-

vertising will cost money, but that it may be dominated by only one group from one part of the political spectrum. A onesided flood of editorial advertisements could hardly be called the "robust, wide-open" debate which the people have a right to expect on radio and television.

Again, however, invalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting *some* editorial advertisements, there is room for the Commission and licensees to develop such guidelines.[54] For example, there could be some outside limits on the amount of advertising time that would be sold to one group or to representatives of one particular narrow viewpoint. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. *See* text at pages [A-22 - A-23] *supra*. However, we are confident of the Commission's ability to set down guidelines which avoid that danger.

We are no less confident of its ability to deal reasonably with the final problem it has raised—that relating to licensees' fairness obligations. Invalidation of a flat ban on editorial advertising, of course, leaves the Commission the power to require that if editorial advertisements are accepted on one side of an issue, then broadcasters must also accept at least some advertisements on the other side of the issue, free of charge if necessary. *See Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). The result of such a reasonable regulation, however, need not be financial disaster. Indeed, it is incredible that the Commis-

[54] In the context of regulating demonstrations or picketing, guidelines which limit access because the same or similar groups had already had substantial access would be unusual and perhaps impermissible. However, the interest in maintaining some degree of balance on the broadcast media is particularly great. And "the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. F.C.C.*, *supra* Note 7, 395 U.S. at 386.

sion would enforce a rule so rigid that licensees would be driven out of business.[55] If the obligation to provide some free time for answering editorial advertisements were shown to threaten actual financial harm to particular broadcasters, the Commission could make necessary adjustments.[56]

We conclude that none of the spectres raised by the Commission and intervenors—spectres of chaos, grossly unbalanced programming and financial disaster—is enough to justify a flat ban on editorial advertising. What real problems there are may be dealt with while the acceptance of *some* editorial advertisements is required. The keynote must be a scheme of reasonable regulation, administered by the licensee and guided by the Commission. At least in the past, the Commission has not considered this task so impossible. Twenty-five years ago it decided a case in which a union charged that a broadcaster was violating free speech rights by refusing to sell program time for the airing of controversial views. The Commission stated:

> "* * * The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech, subject only to general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest. * * *
>
> "* * * No single or exact rule of thumb for providing time, on a non-discriminatory basis, can be

[55] We note that the Commission's requirement of free time for antismoking was administered generously toward the financial concerns of licensees and, indeed, few broadcasters seem to have been deterred from accepting cigarette commercials as a result. *See National Broadcasting Co., Inc.*, 16 F.C.C.2d 947 (1969).

[56] *See* Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U. L. REV. 1222, 1249 (1970). We must be somewhat skeptical of the talk about financial disaster. For, according to Commissioner Johnson, television broadcasters at least "*average* a 90 to 100 percent return on tangible investment annually." N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 65 (1969). (Emphasis in original.)

> stated for application to all situations which may arise in the operation of all stations. The Commission, however, is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest * * *. The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it placed an arduous task on management should not be made a reason for evading the issue by a strict rule against the sale of time for any programs of the type mentioned."

United Broadcasting Co., 10 F.C.C. 515, 517-518 (1945). We agree with those views, and see no reason why the Commission and broadcast licensees should be any less competent in 1971 than they were in 1945. Given a scheme of reasonable regulation, there is no reason why acceptance of editorial advertising should cause any substantial harm or disruption not already involved in the acceptance of other advertising. Therefore, to single out and exclude editorial advertising is to violate the First Amendment of the Constitution.

VII

On the basis of the foregoing, we reverse the Commission's decision that a flat ban on all editorial advertising is permissible. However, we remand these cases to the Commission for further consideration. On remand, the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements. Petitioners

should be allowed to reapply for advertising time; and, unless their presentations are found to be excludable under the Commission's guidelines, their applications should be accepted. Since the issues on which BEM and DNC seek to speak are current and changing, it is essential that regulations be developed speedily and that the affected broadcasters pass promptly upon petitioners' applications to buy time.

In the end, it may unsettle some of us to see an anti-war message or a political party message in the accustomed place of a soap or beer commercial. But we must not equate what is habitual with what is right—or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy. That is a small price to pay. For, as the Supreme Court has said, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

Reversed and remanded.

MCGOWAN, *Circuit Judge, dissenting*: The majority do not hold that petitioner in No. 24,492 is entitled to have its proposed spot announcements carried by the intervenor-licensee there involved, or that the petitioner in No. 24,537 is assured of being able to buy time for its programs on public issues. What is held is that the Constitution commands that "*some*", but not all, editorial advertising be accepted; and the Commission is directed to embark upon rulemaking to determine how a licensee is to differentiate the "*some*" from the all.

The majority appear to believe that this assignment will not prove difficult. I am not so sure, particularly when I note that the only Commissioner who has perceived the same constitutional requirement as the majority responds to the practical problems by suggesting that sales of a significant proportion of the total broadcast time be made on a first-come, first-served basis, accompanied by a possible suspension of the fairness doctrine. That approach does not seem to me a promising one in terms of the public's right to know.

The difficulties derive, of course, from the physical peculiarity which distinguishes radio and television communication from all other forms, namely, the limited number of frequencies and the impossibility of accommodating all who may wish to be heard over them. This, so the Supreme Court has said in *Red Lion*, makes it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of each individual to speak, write or publish." The majority, in recognition of this fact, do not purport to discern other than an "abridgeable" or "limited" First Amendment right to initiate paid editorial advertising. Petitioners themselves, it is said, may conceivably never be able to insist that their particular advertising be accepted. That will depend upon the rules which the Commission propounds.

The Commission has, at the least, been set a task of heroic proportions, and one whose very complexities may undermine the premise upon which it is founded. The question is whether the Constitution requires that it be undertaken. I am not convinced that it does. It is presently the obligation of a licensee to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance, striking a balance which is always subject to redress by reference to the fairness doctrine. Failure to do so puts continuation of the license at risk—a sanction

of tremendous potency, and one which the Commission is under increasing pressure to employ.

This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice. Its existence provides a mechanism for implementation of the public's right to know which, by and large, has been effective. Indeed, the loudest voices in criticism of it complain that it has been working too well for the comfort of governmental policy makers in the areas of greatest current concern.

It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired, and in what format, even assuming, as is likely to be the case, that those issues, whatever they may prove to be, compare favorably with the intellectual content of the great bulk of commercial advertising. The responsibility for informing the public is now squarely on the licensee. That responsibility will only be diluted and obscured by requiring the licensee, against his own better judgment, to accept paid editorial advertising. I do not think the First Amendment requires that result, at least not within the context of a regulatory scheme which has made provision for the airing of controversial issues of public importance.

Of course it is true that licensees are currently free to accept paid editorial advertising, and some do, subject always to the limitations of the fairness doctrine. It may well be that a detailed inquiry and investigation by the Commission of this area, by formal rulemaking or otherwise, would be both useful and consonant with the Commission's continuing obligation to see to it that the public interest obligations of the licensees are being met in the most effective way. The Commission's currently announced purpose to undertake a comprehensive and wide-

ranging review of the operation of the fairness doctrine might well include the subject of paid editorial advertising. But, believing as I do that the First Amendment exerts no compulsion to the contrary, I would not order the Commission to undertake that review in a constitutional strait jacket which dictates the result in advance.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR
VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
INTERVENOR

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING CO., INC., INTERVENOR,
COLUMBIA BROADCASTING SYSTEM, INC., INTERVENOR

Petitions for Review of Orders of the Federal
Communications Commission

Before: Wright, McGowan and Robinson, Circuit Judges.

B 2

JUDGMENT

These cases came on to be heard on the records from the Federal Communications Commission, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the orders of the Federal Communications Commission on review herein are hereby reversed and the cases are remanded to the Federal Communications Commission for further proceedings in accordance with the opinion of the Court filed this date.

Per Curiam

For the Court:
Nathan J. Paulson
Clerk

Dated: August 3, 1971

Opinion by Circuit Judge Wright
Separate dissenting opinion by Circuit Judge McGowan

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971

No. 24,492

BUSINESS EXECUTIVES' MOVE FOR
VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
INTERVENOR

No. 24,537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING CO., INC., INTERVENOR,
COLUMBIA BROADCASTING SYSTEM, INC., INTERVENOR

Before: Wright, McGowan and Robinson, Circuit Judges.

ORDER

On consideration of the petitions for rehearing filed by Post-Newsweek Stations, Capital Area, Inc., American

Broadcasting Companies, Inc., the United States of America and Federal Communications Commission, and Columbia Broadcasting System, Inc. for rehearing, and of the brief of *amicus curiae* National Broadcasting Company, Inc. in support of the petitions for rehearing, it is

ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam

October 4, 1971

APPENDIX D

F.C.C. 70-861

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

IN RE DEMOCRATIC NATIONAL COMMITTEE,
WASHINGTON, D. C.

Request for Declaratory Ruling Concerning
Access to Time on Broadcast Stations

MEMORANDUM OPINION AND ORDER

(Adopted August 5, 1970; Released August 12, 1970)

BY THE COMMISSION: COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

BACKGROUND—REQUEST AND PLEADINGS

1. On May 19, 1970, the Democratic National Committee (DNC) filed with the Commission a request that the Commission issue a declaratory ruling that

"A broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [1]

2. DNC seeks a declaratory ruling on these matters because of its desire to purchase time on individual broadcast stations and networks for the purpose of presenting programs and spot announcements of varying duration, some of which would be devoted to the solicitation of funds while others may contain comment on va-

[1] Comments with respect thereto were filed by the American Broadcasting Company (ABC) on June 11, 1970 and by the Columbia Broadcasting System (CBS) on June 22, 1970 and a statement by the National Broadcasting Company (NBC) was filed on June 22, 1970.

rious controversial issues of public importance. The campaign envisioned will, according to DNC, require the expenditure of "thousands of dollars" and thus it seeks assurance that it will be able "to obtain the access to the broadcast media which implementation of the plan demands." It appears that in the latter part of March, 1970, CBS rejected a request by DNC to purchase one-half hour of prime time for the presentation of an issue—oriented program which would have included an appeal for contributions to the Democratic Party. It is said that CBS' position at that time was that it would sell time for political purposes only during election campaigns. DNC also approached NBC and was told that that network would make available prime time for purchase by the Committee for a program presenting the views of the party on important public issues and including a solicitation of funds for the party. It is not clear that DNC approached the ABC network in view of the latter's alleged general policy against solicitation of funds other than for charity and with network approval. By reason of the foregoing and the alleged common policy of individual broadcast stations to decline to sell time for spot announcements or programs for the broadcast of views on controversial issues of public importance or for the solicitation of funds, DNC states that its problem—access to broadcast licensees for the presentation of its programs—can be resolved only through the issuance of the blanket declaratory ruling described in paragraph 1, *supra*.

3. We believe that the policy matters raised by DNC are, to a substantial extent, appropriate for consideration and that a full statement of our views will provide helpful general guidance for the public and Commission licensees. We, however, do not believe that all of the various matters raised by DNC are susceptible to the declaratory order sought and we cannot at this juncture rule upon every conceivable factual situation which may arise.

4. In support of its request, DNC has set forth some pertinent financial considerations of present-day political campaigning and the development of a narrow rather than a broad-based financial support of political parties.[2] DNC contends that access to mass media, particularly radio and television, is necessary to attract the attention and seek the support of potential small political contributors. It is only in this way, DNC contends, that a healthy political system can function. DNC urges that its proposed broadcast campaign should not be precluded by a variety of differing station and network policies and that the question of access to broadcast media for responsible groups should be subject to a uniform national policy. The arguments advanced by DNC are based upon constitutional, statutory and public policy grounds.

5. The constitutional argument advanced by DNC is essentially that the Supreme Court's decision in *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367 (1969) reaffirmed the public's First Amendment right to hear contrasting views on issues of public importance and "employed language that would extend to members of the public the right of access to broadcast facilities." DNC argues that the network policies of ABC and CBS represent arbitrary barriers to broadcast facilities contrary to the law as expressed in *Red Lion, supra.* DNC suggests that under the *Red Lion* standard reasonable restrictions by broadcasters are permissible—e.g., limitation of use of broadcast facilities to responsible spokesmen and protec-

[2] For example, in 1968, $90 million was expended on political use of radio and television (equaling about 1/3 of the total expenditure on political campaigning for the year). See Alexander and Myers, *A Financial Landslide for the GOP*, Fortune. March 1970, pp. 104, 189. Another indicative statistic is the fact that in 1956, only 40% of the contributions to the Democratic Party exceeded $500 whereas the figure had increased to almost 80% in 1968. According to DNC the narrowing of the political contribution base can result in a dangerous concentration of the sources of revenue in special interest groups which, in turn, threatens the entire democratic process.

tion against use of facilities for libelous presentations or those in bad "taste."

6. According to petitioner, the overriding public policy consideration requiring the declaratory ruling is that the public airwaves—the most powerful communications medium in our society—which are used to solicit funds for "soaps, brassieres, deodorants and mouthwashes" should be utilized to solicit funds to enhance the exchange of ideas. DNC contends that regardless of whether the Commission issues the declaratory ruling requested, the refusal of a broadcaster to sell time to DNC should be evaluated adversely to such broadcaster at time of renewal. The reason for this, DNC urges, is the importance of the broadcast media to political expression (*Farmers Ed. and Coop Union* v. *WDAY*, 360 U.S. 525, 529-30 (1959)); the public interest consideration inherent in broadcasters making time available for political broadcasts (*Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 RR 1901 (1960)); the Commission's prior holding that an arbitrary limitation of coverage of an election campaign prior to the campaign was contrary to the public interest (Citing *Homer R. Rainey*, 3 RR 737 (1947); *City of Jacksonville*, 12 RR 113, 180j (1959); and *Loyola University*, 12 RR 1017, 1099 (1956)) and that the Commission's ruling in *Women's Strike for Peace* (letter of November 22, 1965) predates *Red Lion* and, to the extent it conflicts with that decision, is no longer controlling. Finally, DNC notes that it is seeking not a ruling which would require a broadcaster to accept particular programs or announcements, but only that broadcasters may not establish arbitrary barriers to access by responsible groups, such as DNC, contrary to the First Amendment and *Red Lion*, *supra*, or that the establishment of such barriers is contrary to the public interest.

7. *Response of the Networks:* In response to the DNC request, American Broadcasting Companies, Inc. (ABC)

submitted portions of its "standards and policies" (The complete version has been filed in BAL-5733, Exhibit I-B, Attachment B, Section III). ABC recites its standards relating to solicitation connected with appeals for charity (no solicitation without specific permission of ABC) and appeals related to religious broadcasts (solicitation permitted in prescribed manner not here relevant), but states that its policy is not to sell time for solicitation of funds in other situations, absent special public interest considerations. It is ABC's judgment that DNC's request is concerned with "the continued strength and viability of our two party system" and is thus a "special public interest consideration" justifying an exception to its normal policy of not selling time for solicitation purposes.

8. ABC states that with respect to controversial issues of public importance, there are "dozens" of "responsible entities" who would wish to purchase time to present their views "were we to open the door." ABC contends that it would be "reasonable to anticipate a flood of such requests." Thus, ABC states, it will adhere to its general policy against the sale of time for controversial issue programs and announcements. However, ABC under its "special public interest consideration" standard would ". . . be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis."

a. CBS' lengthy response to the DNC complaint advances three major arguments: (1) that DNC has misunderstood CBS' policies relating to presentation of controversial issues and that CBS' policies insure full and fair presentation of such issues; (2) that a regulatory policy which imposes common carrier obligations on broadcasters would be contrary to the public interest; (3) that there is no constitutional or statutory right to compel broadcasters to carry the DNC programs; and, (4) that such obligation would be contrary to the Communications Act and Commission precedent.

9. With respect to the first major argument, CBS argues that DNC has not alleged violation of the fairness doctrine but rather seeks to take presentations of controverial issues away from the control and supervision of the licensee. CBS states that if licensees were required to permit the purchase of air time for the presentation of views on controversial public issues, the nature of broadcasting would be radically altered to the detriment of fair, objective and balanced information available to the listening public.[3] CBS has followed a policy of refusing the sale of broadcast time for presentations of controversial issues in favor of providing "significant opportunities" for such discussions without charge to proponents of various viewpoints through news and information broadcasts. To sell time for presentations on public issues, argues CBS, would result in the preemption of the limited broadcast frequencies by those with strong financial resources which would "necessarily distort the manner in which issues were presented" to the public. CBS asserts that under its present policies, it provides a "high proportion of direct presentations of views" by "the actors in the events of the day" and thus, aside from fully informing the public of differing viewpoints on controversial issues, also provides an opportunity for those holding differing viewpoints to present their own views. These direct presentations, CBS notes, are part of its overall effort to inform the public fully and fairly and

[3] CBS asserts that it has served the public by presenting issues and viewpoints within a balanced program schedule utilizing newsworthiness as the sole criterion. CBS emphasizes the growth of public affairs and news presentations during the 1968-69 v. 1956-57—e.g., total hours of news and public affairs broadcasting—1,354 v. 675; prime presentations—192 v. 34; regularly scheduled hard news 6:00 p.m.—11:00 p.m., 338 v. 130; and total hours of news documentaries 100 v. 37. In addition, CBS also presents a comprehensive exhibit to demonstrate the coverage given one of the major issues of the day by CBS and WCBS-TV—the Indochina War and domestic reaction to it. This Indochina exhibit includes a minute and second analysis of CBS' total coverage of this issue and runs over 100 pages.

are not permitted to become an instrument of "partisan advocacy." The First Amendment, CBS argues, is primarily concerned with the right of the public to be informed—as opposd to the right of the public to speak or to be heard.

10. CBS' policy against sale of time for the presentation of views on controversial issues does not apply to broadcasts on behalf of political candidates or ballot propositions. This exclusion is based upon CBS' belief that the intent of Section 315 is to facilitate the discussion of political issues by legally qualified candidates; such political broadcasts may include a direct appeal for funds so long as CBS is not involved in the collection or handling of such funds. CBS also states its intention to permit the purchase of a special category of spot announcement (up to one minute in length) for the purpose of political fund raising which need not be on behalf of political candidates or ballot propositions.

11. With respect to the common carrier argument, CBS states that such a policy would be contrary to the public interest because partisan presentations would diminish the time available for other news, sports and entertainment programs and would result in an "auction" to the highest bidder to determine what issues will be discussed and how such discussion will be conducted. Moreover, CBS queries, would the broadcaster then be responsible for restoring the balance? How would a network choose among competing bidders if not enough time were available for all? What standard is to be used to determine "responsible entities?" CBS argues that DNC's proposal would divest the licensee of responsibility for controversial issue programming and would ultimately require the Commission to make judgments as to the specific programs which are presented or rejected.

12. The legal arguments which CBS advances—i.e., that DNC's request is without constitutional or statutory

basis, that Commission compulsion to carry DNC's programs is barred by the Communications Act, and that the action which DNC requests of the Commission is contrary to the Commission's own policy and precedent—are based primarily upon the assertion that no particular person or group has the right to speak over broadcast facilities and that to assert such a right would ultimately require the Commission to assume the role of a censor or arbitor of specific programs, contrary to its long-established policy of avoiding such governmental involvement. CBS asserts that the *McIntire* case [4] stands for the proposition that "broadcasters, though licensed by the Commission and subject to its valid regulations, are not publicly owned facilities, and there is no First Amendment right to purchase time on radio or television stations." CBS further asserts that nothing in *Red Lion* [5] indicates that *McIntire* is no longer good law or that, apart from Section 315, there is any legal obligation for broadcast licensees to sell time. Rather, CBS says, *Red Lion* merely sustained long-standing Commission policies which are wholly inconsistent with DNC's request.

13. To accede to DNC's request, CBS argues, would violate Sections 3(h) and 326 of the Communications Act, which taken together establish that the licensee—not the Commission—is to exercise the power of program selection. The right of *personal* reply to material previously selected for broadcast is limited to equal opportunity for political candidates, replies to personal attacks and replies to station political endorsements. CBS contends that the legislative history of the Communications Act supports its assertion that the statutory scheme envisions a system in which the broadcaster is left with the initiative of assuring that programs presented are in the public interest.

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[4] *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945) *cert. den.* 327 U.S. 779 (1946).

[5] *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367 (1969).

14. Finally, CBS asserts, DNC's request is "fundamentally inconsistent" with the concept of licensee responsibilities and specifically, contrary to the Commission's prior holdings that "the Commission has no power to require a broadcaster to carry or refrain from carrying any particular program, or to prescribe the content of any program presented over the air." Letter to *Women's Strike for Peace*, November 22, 1965.[6] Nothing in the *Red Lion* decision, *supra*, states CBS, indicates that the Court contemplated the abandonment of "traditional FCC fairness policies" and the adoption by the FCC of a common carrier theory as set forth in the DNC request.

15. NBC has no policy which would prevent the purchase of program time envisioned by DNC or the solicitation of funds for the party during such a program. DNC states that it is not clear whether NBC would permit short spot announcements designed for the solicitation of funds for a party, but this simply points up the desirability of a concrete factual situation—namely, of DNC making a specific request, instead of the general, more vague approach which it has taken here.

DISCUSSION

Part I. The right of responsible entities to purchase time for comment on public issues

16. The DNC petition raises two separate questions: (i) the asserted right of political parties to purchase broadcast time to solicit funds, and (ii) the asserted right of responsible entities to purchase time for comment on public issues. In this Part I, we deal with the second question.

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[6] To support this proposition, CBS also cites *McIntire* v. *Wm. Penn Broadcasting Co., supra;* 1949 *Editorilizing Report,* 13 FCC 1246; 1960 *Report and Statement of Policy in the En Banc Programming Inquiry,* 25 Fed. Reg. 7291 (August 3, 1960); and letter to *Judy Collins,* March 24, 1970.

17. That question goes to the heart of the system of broadcasting which has developed in this country—i.e., the licensing of private entities under the public interest standard. While the issues raised by the DNC petition are fundamental, they are not open. They have long been settled adversely to the DNC position, by the statute, by the Commission, and by the Courts. We shall discuss the present system and its statutory support, the relevant precedents, and the policy considerations.

18. The system which Congress has evolved has been described in full in the landmark decisions in this field—*NBC* v. *U.S.*, 319 U.S. 190 (1943), and *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. 367 (1969). We shall not repeat that discussion here. It is sufficient to note that it is based upon the unique nature of radio—that "unlike other modes of expression, radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied." (*NBC* v. *U.S.*, *supra*, at 226.)[7] To resolve the chaotic situation which had resulted, Congress decreed a system of licensing private entities for short terms, upon the condition that their operations serve the public interest. It is thus incumbent upon these public trustees to fashion schedules which do meet the needs and interests of the public. To do so, the broadcaster must allocate programming among the several categories (e.g., entertainment, instruction, news, public affairs) and, within those categories, must choose among the many competing requests for air time. See *Report on Editorializing*, 13 FCC 1246, 1247-48 (1949). However, there is one special obligation which the Commission has stressed—that broadcasters must ". . . devote a reasonable percentage of their broadcast time to

[7] The Court recently reaffirmed this vital distinction in *Red Lion* (*supra*, at 388): "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."

the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station" (*id.* at p. 1249). Indeed, the Commission has stressed that it has allocated so much spectrum space to broadcasting, basically because of the great contribution which broadcasting can make to an informed public opinion on the vital public issues of the day. *Ibid., Storer Broadcasting Co.*, 11 FCC 2d 678. It follows that the Commission can and must require the achievement of that allocation purpose by its broadcast licensees. See Section 303(b); *Red Lion Broadcasting Co. Inc.* v. *F.C.C., supra* at p. 394. In short, as stated by the Court in *Red Lion, supra,* at p. 394, the licensee is ". . . given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."

19. The Commission has consistently made clear that with some exceptions not here pertinent, the licensee has discretion in discharging that obligation. Thus, in its basic *Editorializing Report,* the Commission stated:

> It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other

> available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request . . . .

This same policy is set out in the Commission's 1964 *Fairness Primer*, 29 Fed. Reg. 10415, 10416; cf. also 1960 *Programming Statement*, 25 Fed. Reg. 7291 (1960). In line with these general precepts, we have consistently held, in case after case, that with certain exceptions not here involved, no individual has a right to express his particular views by means of a broadcast facility.[8]

20. While the licensee thus has considerable discretion in discharging "the twofold duty" stated in *Red Lion, supra*, at 377—to devote a reasonable amount of time to public issues and to do so fairly—that discretion must be exercised consistent with the public interest standard. The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views because of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners (*Red Lion, supra*, at 389, 390, 394). This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the "profound national commitment that debate on public issues should be uninhibited, robust, and wide-open." *New York Lines Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); see also *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. 367, 392 (n. 18) (1969); *Storer Broadcasting Co.*, 11 FCC 2d 678 (1968); *Anti-Defamation League of B'nai B'rith*, 9 FCC 2d 190, 191 (1966), affirmed *Anti-Defamation League* v.

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[8] *Dowie A. Crittenden*, 18 FCC 2d 499 (1969); *Mrs. Margaret Z. Scherbina*, 21 FCC 2d 141 (1969); *Democratic State Central Committee of California*, 19 FCC 2d 833 (1968); *Boalt Hall Student Association*, 20 FCC 2d 612 (1969); *Mrs. Madalyn Murray*, 40 FCC 647 (1965).

F. C. C., 403 F. 2d 169, 170 (1968) (C.A.D.C.), *cert. den.* 394 U.S 930 (1969). In sum, as stressed in the *Editorializing Report*, *supra*, at p. 1249:

> It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

See *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, *supra*, at p. 390:

> It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.

21. With this as background, we turn to the DNC petition. That petition seeks to overrule the above policy and to require licensees to sell time to any responsible entity to comment on a public issue. Using the CBS response as an example, we note that it would require a holding that CBS' policy in this area is inconsistent with the public interest, because although it recognizes its obligation to devote a reasonable amount of time to controversial issues of public importance (and has submitted a showing of its increasing efforts in this respect, including during prime time hours), and to do so fairly by providing ". . . significant opportunities for such [broadcast] discussion without charge to partisans of various viewpoints in [its] news and information broadcasts" (p. 3, CBS Response), CBS will not sell time for the expression of viewpoints on public issues (with the exception of political broadcasts). It is important to bear in mind that DNC has not alleged that CBS or any other licensee has failed to discharge the above-noted obligations of the fairness doctrine. Thus, what is involved in the DNC request is a question whether there is a right of access to broadcast facilities by "responsible entities" over and

beyond the fairness doctrine right of the public to be informed.

22. The DNC position—that the licensee, upon request, must sell time to any responsible entity for comment on public issues—runs counter to the statutory language and the legislative history. That history shows that Congress specifically debated and rejected the idea of the licensee being required to act as a common carrier with respect to transmission of comment on public issues. See Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 4; 67 Cong. Rec. 5560-5561, 12501-12504. The Act reflects this. Section 3(h) states that a broadcaster shall not be deemed a common carrier. Section 315(a) sets out the pertinent statutory standard—that the licensee must operate in the public interest and must afford reasonable opportunity for the discussion of conflicting viewpoints on controversial issues of public importance. This language cannot be squared with the DNC position; had Congress adopted such a position, the statutory prescription would have been entirely different (e.g., . . . "including the sale upon request of time to responsible entities for presentation of a viewpoint on controversial issues of public importance"). The legislative history makes clear that the language of Section 315(a) is a "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H. Rep. No. 1069, 86th Cong., 1st Sess., p. 5 (1958)—that is, as the legislative history shows, the principles set forth in the basic *Editorializing Report.* That this is the statutory scheme is further shown by the consideration of the second sentence of Section 315(a)—that "no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." The purpose of this provision is to make clear that the broadcaster is not a common carrier as to political broadcasts—that he may exercise discretion as to the time to be afforded broadcasts by candidates. See *Memorandum of F.C.C.*, Hear-

ings before the House Subcommittee of the Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess. on H. J. Res. 247, pp. 84-90 (1963) (to the effect that while the licensee has discretion, he cannot adopt a policy of not devoting a reasonable amount of time to political broadcasts). It would make no sense to hold that the licensee has discretion whether or not to sell time for the most important controversial issue programming of all—the political broadcast by the candidate (see discussion within as to the preferred position of such programming), but has no such discretion as to other controversial issue programs (e.g., by a candidate's supporters; by partisans of a particular viewpoint on some public issue).

23. The administrative and judicial precedents reflect the statutory scheme. The Commission's pronouncements are long established and consistent. See, e.g., *Report on Editorializing*, 13 F.C.C. 1246, 1249 (1949); 1960 *Programming Statement; Women's Strike for Peace*, November 22, 1965. The court cases are to the same effect. *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597, 600-601 (C.A. 3), *cert. den.* 327 U.S. 779; *Massachusetts Universalist Convention* v. *Hildreth and Rogis Co.*, 183 F. 2d 497, 501 (C.A. 1). DNC argues that these cases are no longer relevant in light of the Court's decision in *Red Lion*, and that that decision establishes the correctness of its position. We do not so read *Red Lion*. The Government's brief pointed up the nature of the licensee's responsibility under the *Editorializing Report*, *supra*, at pp. 14-17, 31-32, and the Court recognized the report "as the principal summary of [the Commission's] *ratio decidendi* in cases in this area" (p. 1251). The Court at the outset noted "the twofold duty" imposed by the *Editorializing Report* and the manner in which the obligations under the general fairness request differed from those under the personal attack corollary (pp. 371-379).[9] The

[9] Thus, the Court stated: "These personal attack and political editorializing obligations differ from the general fairness require-

Court's decision is based, we believe, on this foundation. The thrust of that decision is not that the broadcast licensee is a common carrier, required to sell time to all comers on public issues, but rather that he is a public trustee—a proxy—who must present *representative* community views and voices on controversial issues. The Court's decision thus stresses the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over broadcast facilities. The private censorship by broadcasters which the Court rules out is that which would prevent the presentation of representative community views or voices.

24. There are strong policy arguments in support of the Congresssional scheme. We have noted that broadcasting is inherently not open to all (paragraph 18, *supra*). That is true equally with respect to the common carrier access approach urged by DNC. The result could well be a return to the chaotic situation of radio's early days. Since the broadcast medium is a limited one, the amount of time to be devoted to public affairs—as against the other needs and interests of listeners—is also limited. This balance between the categories could be drastically skewed by a requirement that the broadcaster must make available time slots for the discussion of a controversial issue. Further, the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent—by the person or group which ". . . has the financial resources and interest to purchase sustained access to the mass communications media . . ." (*Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (C.A.D.C. 1968),

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ment that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attached party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from preceding fairness doctrine." *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. at 378.

cert. den., 396 U.S. 842). Since the amount of broadcast time for discussion of controversial issues is limited and since the licensee must afford reasonable opportunity for discussion of both sides, the purchase of substantial blocks of time for a campaign by, say, the oil industry to discuss the issue of the oil depletion allowance would impose the burden to present reasonably the other viewpoint, and in turn would inevitably cut down on the amount of time for discussion of other issues. But we believe that such allocations of limited time are to be made on the basis of the *public* interest—not that of any private group, however powerful or affluent. Further, the public trustee would lose control over the important aspect of the manner in which the public is to be informed. We recognize that in some instances short spot announcements may serve a useful purpose in this area (see *infra*, p. 17). But we have also pointed up the limitations as to many issues of this manner of informing the public. See e.g., Hearings before the Senate Commerce Committee, H.R. 6543 (1969), pp. 142-143; *Voters Time Rept.*, p. 15. A licensee which reasonably made the judgment that an issue was too complex to be discussed in a 30-second commercial —that "hawking" the issue like a soap did not serve the public interest—would find that judgment frustrated by the DNC policy; it would be required to sell the spots and ordered to make time available to opponents on a similar basis. See *Cullman Broadcasting Co.*, 40 FCC 516 (1963); *KING Broadcasting Co.*, 10 FCC 2d 968, 970 (1967).

25. This last point—the application of *Cullman*—merits further discussion. The *Cullman* principle was developed to deal with the situation where the broadcaster has sold time to one side to present its views, has not presented or made plans to present the contrasting viewpoints, and rejects programming which he deems suitable to present those viewpoints, unless the party offering such programming will pay for its presentation. We held that the licensee could not properly insist upon payment in

such circumstances. The paramount public interest, we stressed, is the right of the public to be informed. The licensee has adjudged that an issue is of importance to its area by presenting the first viewpoint; that being so, the public's right to hear the other side cannot turn on whether the licensee received money.[10] This approach perfectly fits the public trustee concept. It does not fit a common carrier approach. For under the latter system, the licensee has to sell the time, no matter the amount, and then finds himself having to afford free time to the proponents of the contrasting viewpoint, again no matter what the effect on his ability to serve the public interest. Further, under a common carrier approach, each side is usually relegated to purchase, with no "*Cullman*" rights. We believe that *Cullman* is a correct and sound doctrine which ties in with the public trustee concept and best serves "the public interest in the larger and more effective use of radio" (Section 303(g)).

26. In connection with the above discussion, we should note that there is of course no Commission policy thwarting sale of time to comment on public issues. Licensees are free to do so, with the caveat that the fairness doctrine, including the *Cullman* aspect, must be observed. The critical issue is whether the licensee, to discharge either of "the twofold duties" noted at the outset—to devote a reasonable amount of time to issues of public importance and to do so fairly—must sell some time to comment on public issues. The foregoing discussion makes clear that the licensee need not do so. If, for example, CBS chooses not to sell time but rather to fulfill its obligation on a sustaining basis in the manner disclosed in paragraph 9, *supra* (e.g., to provide significant free opportunity for partisan presentations), that choice is within its discretion. What is crucial is that the licensee does meet its obligation "to operate in the public interest

[10] For the different application of *Cullman* to the political broadcast field, see *Letter to Nicholas Zapple*, FCC 70-598 (1970).

and afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315(a).)

27. Finally, we point out that the Commission does recognize the importance of fostering "a multitude of voices" in the discussion of public issues. Thus, it sought to promote the growth of FM radio, UHF television, and noncommercial educational broadcasting, and is seeking to promote a new technology which can make a most significant contribution in this respect—cable television. Because of the potentially great number of channels, cable opens up the possibility of common carrier channels, public access channels, etc. See Notices of Proposed Rule Making In Dockets Nos. 18397A and 18874, 23 F.C.C. 2d ——, released July 1, 1970. But the policy in the broadcast field is shaped by the inherent characteristics of that field. As we have shown, that policy is based on the right of the electorate to be informed, and is an issue-oriented "right of access," not the right of any individual to access.

28. At the risk of some repetition (see particularly pars. 24, 25), we believe it appropriate to take up the position set forth in the dissent of Commissioner Johnson.[11] We cannot accept the position of the dissent that the course we are taking conflicts with the First Amendment. As we understand it, the dissenting opinion of Commissioner Johnson urges that the operation of a broadcast station is analogous to the administration of a public facility, such as a park or a municipal bus (whether publicly or privately owned), and that once the facility is appropriately opened for the expression of views on public issues or commercial advertisements, it is a denial of First Amendment rights to reject or censor a profferred

[11] That dissent is addressed also to the Commission's decision in the *BEM* case, F.C.C. 70 ——, issued this day. Our discussion here is of course equally applicable to the *BEM* case, and we so stated in that opinion.

announcement constituting constitutionally protected speech by one willing to pay the customary rate, if there is ordinarily a charge. While we need not disagree with the premise that the Commission's regulation of broadcast stations under the Communications Act must meet First Amendment standards, we think that the dissent—because it ignores established First Amendment policy in this area—posits a non-existent individual right of access to broadcast facilities.

29. First of all, to the extent that the dissenting opinion urges a near-absolute right of any person who has the money to buy time, it would create a common carrier situation which Congress after due deliberation specifically rejected in Section 3(h) of the Communications Act, 47 U.S.C. § 153(h). Apparently recognizing this collision with the statute, the dissent states (page 25) that Congress and the Commission have permitted a form of private censorship which is inconsistent with the First Amendment. We must note in this connection that it is beyond the power of an administrative agency to declare its governing statute to be unconstitutional. *Central Nebraska Pub. P. & I. Dist.* v. *Federal Power Commission*, 160 F. 2d 782, 783 (C.A. 8, 1947). However, if that infirmity did not exist, we would have no constitutional qualms about our present decision.

30. In its assertion of the unconditional (except for suggested reasonable limitations on time, place and manner) [12] right to buy time, the dissenting opinion takes no account of the basic, constitutionally valid policy of the Communications Act that because radio is "inherently not available to all," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226, there is a public duty adhering to the acceptance of a license to give adequate coverage to public issues which reflects opposing view-

[12] The dissent also mentions quality standards, an exception which is hardly consistent with its argument.

points, if necessary at the broadcaster's own expense. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367. See also 47 U.S.C. § 315(a). As *Red Lion* makes clear, the licensee is a fiduciary with obligations to present views and voices which are representative of his community. It is through this basic approach that the paramount right and interest of the public to be fully informed is protected. The operator of a public park or transit system has no such obligation; if the analogy offered by the dissent were valid, a broadcaster would be free to present only one side of every public issue so long as he did not reject any one who chose to speak. There would be no obligation to present the other side, let alone the obligation imposed by *Cullman Broadcasting Co.*, 25 R.R. 895 (1963) to put on an opposing view without charge. It is clear, therefore, that the analogy to other types of facilities that carry speech to the public, or furnish a place for speech, is fatally faulty.

31. Furthermore, the dissent fails to be adequately specific in detailing the types of limitation which it would permit as inroads to the general principle of an absolute right of access. Presumably, the licensee would not have to turn over all of its time on a first come, first served basis, for this would mean that the issues discussed and the persons speaking would be governed entirely by money. But even if the dissent would permit the licensee to specify amounts of time and issues, the suggested system would appear to be unsound. First of all, the individual right upon which the whole dissent is premised would largely disappear. No person would have the right to discuss an issue of his choosing, at the time of his choosing, and for a duration of his choosing. How could the licensee validly determine that a particular speaker could effectively make his argument in 10 minutes, 5 minutes or a 30-second spot? Yet such determinations would be required. We have said that a licensee may

reasonably determine that a position on a complex issue should not be peddled like soap in a few seconds. The dissent would presumably upset that ruling—to what purpose? Beyond these questions is the more important difficulty that depriving the licensee of the discretion to choose representative spokesmen on controversial public issues [13] would lead us to a first come, first served platform dominated by financial considerations—the very result the dissent seeks to avoid and something the Supreme Court has already stated to be undesirable in *Red Lion*.

32. In short, we think the present system of regarding licensees as trustees, *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597 (C.A. 3, 1945), *cert. den.* 327 U.S. 779, with a duty to present contrasting viewpoints through representative spokesmen, is constitutionally sound and of greater public benefit than the concept of an individual right of access, which as we have shown has great drawbacks in the broadcast field.

Part II. The right of political parties to purchase broadcast time to solicit funds [14]

33. In view of the positions now taken by the three major networks (the only parties whose policies were singled out by DNC were CBS and ABC), no extended discussion is called for in this Part.

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[13] There could be a case where the licensee's policy in this area would be arbitrary (e.g., where he covers the issue, and in announcements of a few seconds duration, and then refuses to let others discuss the issue on this basis). No such case is or has been before us. We have ruled on the assertions of DNC and BEM of general entitlement to time to discuss public issues. Our holding is in that context.

[14] While the DNC petition is couched in terms of selling time to "responsible entities" to solicit funds, the petition before us is that of a political party and our discussion here is confined to purchase of time by such parties for solicitation of funds.

34. NBC has stated that it has no policy against the sale of time to a major national political party, to be used for the solicitation of funds for the party, including during non-campaign periods. CBS initially rejected the DNC request since it occurred outside an election campaign, but has now revised its policy to permit the purchase during any period by a political party of spot announcements (not to exceed one minute in length) designed to solicit funds for the party. ABC set forth its policy that "absent special public interest considerations, ABC will not sell time for comment on controversial issues or for solicitation of funds" (p. 3, ABC of June 10, 1970, to William B. Ray), but then stated:

> The continued strength and viability of our two party system are of vital importance. ABC has emphasized in recent Congressional hearings the importance of a wider base for political contributions—small sums from millions of Americans rather than large contributions from a few.
>
> * * * *
>
> Because the strength and viability of the major political parties are vitally important, ABC would be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis. At the same time, we proposed to continue our general policy against the sale of time for controversial issue programs and announcements and solicitations for funds, absent special public interest considerations.

ABC then invited the Commission to address itself to its proposed treatment of the case.

35. We concur in that treatment. We note that Congress has singled out the presentation of the political broadcast as a particularly important aspect of the licensee's public interest obligation. See Section 315(a), *Farmer's Union* v. *WDAY*, 360 U.S. 525 (1958) (citing

F.C.C. cases); F.C.C. Memorandum on Second Sentence of Section 315(a), Hearing before Subcommittee of Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90. It also requires no discussion to establish that political parties are an integral part of our democratic process and that it serves the public interest to promote the widest possible support by citizens of the party of their choice. See *Voters Time Rept.*, The Twentieth Century Fund (1969), pp. 45-57.

36. In a 1963 ruling, *Letter to Lawrence M. C. Smith*, 40 F.C.C. 549, we sought to encourage the presentation of free broadcast time for this purpose stating:

> First, we recognize that the announcements described by you constitute an effort to achieve the worthwhile and commendable goal of broadening the base of political contributions. The importance of this effort was recently emphasized when, on May 29, 1962, President Kennedy transmitted to the President of the Senate and the Speaker of the House of Representatives legislation designed to carry out five of the important recommendations contained in the "Report on the President's Commission on Campaign Costs." In his letter of transmittal, the President stated, among other things:
>
> "In these days when the public interest demands basic decision so essential to our security and survival, public policy should enable presidential candidates to free themselves of dependence on large contributions of those with special interest. Accordingly, it is essential to broaden the base of financial support for candidates and parties. To accomplish this, improvement of public understanding of campaign finance, coupled with a system of incentives for solicitation and giving, is necessary."
>
> Furthermore, your proposal has an objective, in common with the broad policy underlying the "fairness doctrine"—the right of the public in a free so-

ciety to be fully informed as to controversial issues of public importance, including those involving political parties and candidates. See paragraph 6 of enclosed *Editorializing Report.*

Second, the question whether to present such announcements is one for the licensee, who is faced with many competing requests to allocate time for public service announcements. The Commission of course expresses no opinion as to how that time should be allocated. But the announcements in question should not be rejected upon the sole ground that the licensee would have to be fair in their presentation. *Lawrence M. C. Smith,* 25 Pike and Fischer Radio Reg. 291, at 293 (1963).

37. Whether such time is afforded on a free basis is a matter for the judgment of the licensee. The issue here is whether the licensee may adopt or follow arbitrary policies with respect to the sale of broadcast time to significant political parties for the solicitation of funds. Thus, the prior CBS policy of confining such sales of time to election periods would appear arbitrary, since the need for the widest possible financial support for political parties is not confined to such periods; and indeed we note that CBS offered no reason for such a distinction.

38. In this connection, we note that affording time for such solicitation does not raise any offsetting considerations, because of the combined force of a number of factors:

(i) This area can be appropriately singled out, since Congress has singled it out for special attention by broadcast licensees;

(ii) This would appear particularly to be an area where the relatively short announcement, limited very

largely to fund solicitations, is both effective and appropriate.[15]

(iii) There is no problem under *Cullman.* For, in this regard the principles set forth in *Letter to Nicholas Zapple,* FCC 70-598 (1970), would govern.

CONCLUSION

39. In view of the foregoing, the request of the DNC and ABC for a declaratory ruling IS GRANTED to the extent reflected in Part II and in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur. The essence of the holding as to sale of time for the discussion of controversial issues—as of the *Red Lion* and *Cullman* cases—is that a broadcaster *must* devote substantial time to the presentation of news and public affairs programming dealing with the principal issues of this area. He can sell time for this purpose—subject to *Cullman*—but we will not require him to do so against his wishes. Or he can—and this is generally to be preferred—give time for both sides. I *assume* here that the networks have given, or will give, adequate time for discussion of the key partisan political issues of our time. If not, then we must hold them to that obligation.

I therefore concur generally in this action, except for the matter contained in Paragraph 27.

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[15] Of course, the licensee may exercise judgment as to how to present these solicitations for funds, and can afford more extensive programming time, if he so chooses. Indeed, we stress again the considerable discretion of the licensee, consistent with the obligation of the fairness doctrine, as to the various facets such as number, placement, length, etc. *Cf. Lawrence M. C. Smith,* 40 FCC 549.

Dissenting Opinion of Commissioner Nicholas Johnson

[An opening parable]

[Once upon a time there was a nation as great in ideals as industrialization. It had business everywhere—and unsurpassed military might to protect it. And yet its greatest strength was its foundation. For this nation professed to be governed by the consent of its citizens. To insure the successful functioning of its unusual government, free education, libraries, and full information were provided in order that its 200 million governors, through wide-open debate, might govern wisely. As the years slipped by the people spent more and more time in their air conditioned homes watching television, and less and less time listening to speakers in the public parks and reading handbills on the streets. And yet the great issues, and the need for informed governors, continued. And thus it was that the great debate about the great debate began.

[Everyone had his own theory how to get the democratic dialogue back to the people (who were all home watching their television sets). Some advocated letters, petitions, press conferences, and picketing, but they didn't seem to be successful. Attention shifted to those who advocated bombing, burning, shooting and looting, because before and after the showing of such activities it was usually possible to present a short message on television (however distorted) about the merits of the issue at hand. Then a third group came along. It said, "Let us simply go to the broadcasters peacefully, and ask them for the time to present our concerns—and even pay them." They were jeered by the crowd, but not deterred. The broadcasters politely explained that there was no longer any room at their inn for the discussion of public issues—like war, and life, and politics—because the time all had to be

used for programs and announcements necessary to the very difficult but essential task of manipulating consumers to buy useless and harmful products. And yet these patient and patriotic students, businessmen, and Senators still did not give up. They continued to preach the doctrine of "working within the system." "The government," they said, "will treat us fairly. There is reason and justice in our land. Surely a democratic people need not be violent to be heard." And so it was that they came to the FCC. . . .]

The Democratic National Committee (DNC) has asked the Commission for a declaratory ruling requiring broadcasters to supply two types of "access" to their radio and television facilities: first, the right to purchase, at current commercial rates, short "spot announcements" to solicit funds for political purposes; second, the right to purchase longer segments of airtime for presentation of political programming on important national issues. The majority, so far as I can determine, has equivocated on the first request, and denied the second. I dissent.

I

We should start with a few fundamentals. The great concept of our Constitution, embodied in the First Amendment, was that our democratic government would endure only so long as its citizens and their elected representatives had the leisure to think, the right to speak, and the freedom to criticize their government. As Supreme Court Justices Holmes and Brandeis understood, "the best test of truth is the power of the thought to get itself accepted in the competition of the market," and that in a government of free men, "the deliberative forces should prevail over the arbitrary." See *Abrams* v. *United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting); *Whitney* v. *California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

The issues we grapple with today, therefore, pose a crucial question. How can we create a free and open "marketplace of ideas" over the radio and television medium in which citizens, and their elected representatives, can discuss the great issues that weigh upon our nation?

The second fundamental is equally important. For speech to be free, there must be both a *forum* for communication—whether it be a public park, school, town hall meeting, soap box, leaflet, newspaper, magazine, or radio or television frequency—as well as *procedural rules* to keep order, to make it possible for all (or most) to speak in turn, and be heard, in that forum. Perhaps the greatest legal distinction to be drawn in political and free speech theory is that between restrictions on the *content* of speech (which the First Amendment flatly prohibits), and regulations for the manner of speech (which the First Amendment not only permits but requires). As this nation's concept of speech derives principally from the model of the town meeting, I quote Professor Alexander Meiklejohn, one of the greatest champions of First Amendment freedoms, as he describes the town meeting:

> In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poor houses, health, external defense, and the like . . . . The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. . . . [N]o one shall speak unless "recognized by the chair." Also, debators must confine their remarks to "the question before the house." . . . The town meeting, as it seeks for freedom of public discussion, would be wholly ineffectual unless speech were thus abridged. . . .

Meiklejohn, *The First Amendment Is An Absolute*, 1961 Supreme Court Review 245.

Although the First Amendment would clearly ban governmental censorship of speech content, government must be concerned about the procedural rules that control the public forums for discussion. If someone—a moderator, or radio-television licensee—applies rules that give one speaker, or viewpoint, less time (or none at all) to present a position, then a censorship exists as invidious as outright thought control. There is little doubt in my mind that for any given forum of speech the First Amendment *demands* rules permitting as many to speak and be heard as possible. And if this Commission does not enact them, then the courts must require them.

The anology to broadcasting should be clear. Yet, we have permitted a system of broadcasting to develop in this country in which private licensees serve, not only as "moderators" for the electronic forums of communication, but as all the "speakers" as well. As the majority states, our limited frequencies require someone to serve as "public trustees." No one would deny this need for a "trustee" system. But that is not the issue. The issue is whether that "trustee" must control *all* the available time, or whether policy and the First Amendment require him, in a manner consistent with his other duties, to turn over reasonable portions of that time directly to the people.

In many ways, broadcasters have resolved this issue themselves. For *they* have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. As the system now operates, any person wishing to sell products—toothpaste or "feminine deodorant spray," for example—has direct, personal and instant access to television. He can present his message, in the form he wishes —not in terms of "issues" (the general benefits of toothpaste or deodorant), but in terms of individual products.

He is not forced to rely upon a "trustee" to argue the cause of his product for him under some principle of the fairness doctrine—an occasional mention on the evening news, or a Sunday afternoon talk show. He does it personally and directly.

No, our Rules of Order for radio and television are fantastically skewed. We have an individual right of access, all right, but only for hucksters of industrial garbage. Anyone wishing to discuss war, peace, mental health, or the suffering of the poor, must seek out a corporate "trustee," appointed by the government, to speak for him. But the corporations that have largely contributed to these social ills can defend their wares directly. With the help of Congress and the FCC, the broadcasting industry in this country has built perhaps the most beautiful, efficient, and effective "marketplace of ideas" ever conceived and executed. The industry finds it most profitable, however, to use that marketplace only for the sale of products—not the robust, wide open debate of a free society. And the FCC finds this in "the public interest"!

II

The majority has addressed the first issue—the right to solicit funds via short announcements—in ambiguous fashion. Stating that the three networks have grudgingly announced their willingness to accept such announcements, the majority responds: "We concur in that treatment." (Par. 30.) But how does this "concurrence" rule on the request before us—namely, that broadcasters be *required* to adopt such policies? The majority hints that a denial of such time to political parties outside normal election periods would appear "arbitrary," but does not explain why, nor detail the consequences of such arbitrariness. Because, however, the majority states that solicitation announcements are "appropriate" in this area, I conclude that they make the networks' recently adopted policies binding on them.

In a companion case to this decision, *Business Executives Move for Vietnam Peace (BEM)*, FCC 70-860, Aug. 6, 1970, I have stated in detail my position that a broadcaster cannot accept commercial advertisements, yet reject advertisements which are political in nature. I believe the principles there stated are directly applicable to advertisements soliciting funds for political parties. I will not repeat them here, but merely incorporate them by reference. For reasons detailed in that opinion, I concur in the majority's decision to require licensees to accept advertisements by political parties soliciting funds.

I dissent, however, to the majority's position that broadcasters should not be required to offer time for short announcements to *all* persons for *any* purpose. As I have argued in my *Business Executives* opinion, once a licensee opens his forum to the presentation of commercial views, he cannot then close it in a discriminatory fashion—accepting some commercial views and political solicitations, but rejecting all others. I point out only that the Commission's partial waiver for the DNC to permit it to purchase fund-raising spot announcements only increases the arbitrariness and discrimination involved in denials of access to political parties for short announcements on current issues, or announcements by groups or individuals either soliciting funds or stating positions on national problems.

In *Wirta* v. *Alameda-Contra Costa Transit District*, 434 P. 2d 982 (Cal. 1967), for example, a public transit company sold advertising space in its buses for commercial products, but refused to accept an advertisement by Women for Peace, which simply stated:

> "Mankind must put an end to war, or War will put an end to mankind."—President John F. Kennedy . . .

Stating that the political "advertisement" was clearly protected by the First Amendment, the court flatly or-

dered the company to accept the advertisements for display.

> [A]dvertising is an acceptable and effective means of communication. A regulation which permits those who offer goods and services for sale . . . access to such forum, while denying it to those who desire to express other ideas and beliefs, protected by the First Amendment, cannot be upheld.

Wirta, supra, at 990. The "vice" of censorship lay in "choosing between classes of ideas," accepting commercial ones and banning all others. Every other court faced with the same issue has followed this position. See, *e.g.*, *Hillside Community Church, Inc.* v. *City of Tacoma*, 455 P. 2d 350 (Wash. 1969); *Zucker* v. *Panitz*, 299 F. Supp., 102 (S.D.N.Y. 1969); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 328 (S.D.N.Y. 1967). The application of this arm of the law to broadcasting is relatively new and as yet undeveloped and unapplied. But see *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). I have attempted to show that these cases clearly apply to broadcasting in my *Business Executives* opinion.

The lesson of these cases is clear. The Government could not, for example, allow persons selling products to speak freely in public parks, but bar those opposing the war or require them to "speak" through an interpreter or "trustee" appointed by the Government. No court in the land would tolerate such blatant discrimination. Yet the majority permits this sort of discrimination to occur every day in our nation's electronic "public parks." Although we do not have the question before us, a broadcaster might not have to open his forum to advertising at all. But once he does, he must open it in an even-handed manner—absent some compelling showing of detriment or disruption to his normal programming services. No such evidence on this issue has been supplied to us.

I believe this Commission (perhaps for a two-year trial period) should require broadcasters to accept, up to recognized limits on numbers of commercials, *all* advertisements, whether commercial or political, from *any* person, for broadcast at rates determined by the licensee, on a first-come, first-served basis. If ghetto residents of our major cities wish to purchase announcements decrying the rat-infested, disease-ridden slums in which they are forced to live, they must be given their say. If the Daughters of the American Revolution wish to announce their support for the Vietnam War, they must be given their say. In short, I would open the broadcast spectrum to short announcements from all comers on a first-come, first-served basis. There will be time later to assess and evaluate—to consider, for example, whether the views of the rich predominate—at least, to a greater extent than they now predominate in mass media advertising. I would not expect any fairness doctrine problems. Few licensees would argue that they were unwilling to accept an advertisement because it might force them to present all views on an issue of controversy and public importance. This obligation is already incumbent upon them. And should the fairness doctrine prove unworkable in this field, it could be suspended for this type of programming.

III

The Commission also denies the DNC the right to purchase, at the going rates, half-hour or full-hour programming to discuss issues of national concern. I disagree. If broadcasters are to permit a General Motors or a Ford Motor Company, in effect, to purchase a full hour of "I Love Lucy" as a vehicle upon which to display their commercials, then I do not see how, consistent with the principles enunciated in *Wirta* and other cases, the broadcasters can refuse to permit the leading representatives of our legislative branch of government to purchase the equivalent hour to display their ideologies and concerns.

I would require licensees to accept programming of a political nature, if offered, in an amount up to 5% of their prime time evening schedule on a first-come, first-served basis. Assuming four hours of prime time every evening (from 7:00 p.m. to 11:00 p.m.), and calculating 30 days per month, that would release six hours per month to "pure access" by politicians and citizens groups alike. The individual licensee would, of course, still retain the right to reject programming for inadequate technical and production quality, or violation of federal law (lotteries, obscenity, etc.). But I would assume that programming purchased by the national political parties would, almost per se, meet any pre-established quality standards. Licensee profits would remain at their present high level. And there will be time later to assess this scheme and determine the extent to which fairness doctrine obligations apply. The fairness doctrine could be suspended in this limited area, on the assumption that persons wishing to respond could purchase the necessary reply time. Obviously this 5% figure is only an initial, approximate determination, and obviously any other reasonable percentage determined by the licensee would also be approximate. But the point is that licensees could not reject *all* programming.

The majority essentially raises several objections to such a procedure. First, they argue that this would permit those with "strong financial resources" to pre-empt time and distort the presentation of issues. And they maintain that the views of the wealthy would dictate the agenda of national debate. I disagree. The short answer is that the wealthy already set the agenda for national debate, and a partial "access-for-purchase" procedure would only open a closed system to partial dissent. A longer answer, however, is simply that I have more faith in the theoretical "marketplace of ideas" than does the majority. I am not aware that opening the pages of newspapers or magazines, or the wall space of buses, train stations or subway platforms, have resulted in a

preponderance of "wealthy" views. And I do know that the "Political advertising" that appears in daily newspapers—urging, for example, citizens to write the President in support or opposition of the Vietnam war—is more stimulating and thought-provoking than those of department stores and food chains. All in all, I do not see any imbalance in that system of "print" access. Why should we expect it in radio and television?

But more importantly the dissemination even of "false" or one-sided political ideas often serves a socially useful purpose. False commercial ideas (such as the notion that modern cars are "safe," or do not pollute the air) are unlikely to generate opposing claims; at best, they merely goad competing manufacturers into more and more extravagant claims. On the other hand, expressions of political opinion in this country usually lead to argument and debate, not silent acquiescence; to vigorus opposition, not passive acceptance. And debate and dissent is always healthy. John Stuart Mill saw this over 100 years ago, and I do not believe the passing century has proven him wrong:

> The peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. S. Mill, *On Liberty*, quoted in *Buckley* v. *Meng*, 230 N.Y.S. 2d 924, 932 (Sup. Ct. 1962). Given a system in which the small citizen and the man of moderate means are totally cut out from a system of communication, therefore, I believe a partial access system might move a small way toward righting the present imbalance.

The majority's second justification for its position is that we have a limited number of frequencies, and that some "trustee" must necessarily exercise control over broadcasting time. Any other system would result in chaos. Again, this begs the question. Merely because a "trustee" or "gatekeeper" must control some of the time, I see no compelling reason why he must control *all* of it. Broadcasters have essentially abdicated this "trustee" authority to commercial advertisers, gobbling up sponsors as rapidly as they approach, and limiting themselves only by the commercial maximums suggested for radio and television. They have also, on occasion, sold entire hours to sponsors such as Xerox or National Geographic to present their own programming. The question before us, therefore, is whether the present system of broadcasting could function with a *partial* system of access, leaving the vast bulk of programming still under the control of the networks and individual licensees. Nothing the majority has said convinces me that this is impossible.

The third reason given by the majority is that Section 3(h) of the 1934 Communications Act prevents licensees from being treated as a "common carrier." There are many defects in this position, some of which I have dealt with in my dissenting opinion in *Business Executives*, FCC 70-860, Aug. 6, 1970. Some are as follows.

First, the legislative history of this provision suggests that the drafters of the 1934 Act were concerned only that Title II of the Act, "Common Carriers," and its rather complicated system of regulation, not be imposed on radio. No one would argue that a partial access system would have this result.

Second, Congress wrote into the 1934 Act the concept that broadcast licensees must serve the "public interest, convenience, and necessity." And it goes without saying that the basic principles of the First Amendment are also incorporated implicitly into the Act. We do not have to declare unconstitutional Section 3(h) of the Act to say

that broadcasters must treat persons wishing to do business with it equally. We have ruled in our *Letter to Nicholas Zapple*, FCC 70-598 (1970), for example, that even apart from Section 315(a) considerations, there may be only one appropriate person or spokesman that can satisfy the fairness doctrine obligation imposed upon broadcasters in certain situations. Does this violate Section 3(h) of the Act, by taking from the licensee choice over the person that uses his facilities? Of course not. A limited system of access for purchase is perfectly consistent with Section 3(h) of the Act, the "public interest," and the First Amendment. Indeed, the First Amendment may require such a system or some reasonable facsimile.

Third, a reasonable system of access does not make broadcasters into common carriers. A doctrine preventing broadcasters from rejecting all persons wishing to submit political advertising or other programming does not force licensees to accept everyone. Obviously broadcasters can establish reasonable limitations on the amount of time he will offer other persons. See *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). The First Amendment does not establish any particular proportion on percentage figure; it does require, however, that broadcasters devote *some* "reasonable" portion of their time to "access" programming.

IV

The matters before us go far beyond freedom of speech. For in the last analysis, we are confronted with one of the most serious challenges to the system of "checks and balances," the separation of the legislative and executive powers of government, that our country has ever faced. If, for example, through some bizarre turn of events the President, but not the Congress, was granted access to the computer, the telephone, the telegraph, the typewriter, the printing press, and the Xerox machine, we

would also see a constitutional quandry of the proportions that face us now. The President has immediate, direct and vivid access to all the minds of the prime-time television viewers in America. Can our tri-partite scheme of government survive if the Congress receives substantially less?

Unlike the fairness doctrine, which often imposes a burden on broadcasters due to the importance of the *issue* to the public, principles of pure "access" pay their own way. The broadcasting industry is out-of-pocket nothing. The great mass of news, documentary and entertainment programming will be unaffected. And the forums of the air will be opened to the breeze of dissent, controversy, and thought.

Unlike the fairness doctrine, an "access" system is self-enforcing. No governmental agency is called upon to decide which issues are controversial and of public importance. Issues reach the public immediately, without the years of delay required to push a fairness doctrine controversy through the Commission and the courts.

And, unlike the present system, the views that reach the people will not be dominated by the consensus committees of the corporate television establishment. There are some who fear that the agenda of debate will be set by the rich. But who, after all, sets that agenda now? The great mass of television programming consists of format entertainment series, carefully designed as supportive and palatable packaging for the commercial content supplied by the merchandisers of our land. To the extent a network seeks to provide programming which is "offensive" to some corporate interest, then pressures for censorship are brought to bear—as Coca Cola is alleged to have pressured NBC over its recent documentary on migrant workers. All we can hope for is a system of access in which at least a small percentage of the time and views will originate directly from the people—of

all views, persuasions, and walks of life. That even that modest participation is anathema to the broadcasters is testimony to their dangerous arrogance and unrestrained power. Accordingly, I dissent to today's Commission action.